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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.
Petitioners,

v.

WILLIE MAE PAYNE, *et al.*,
individually and on behalf of
all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

At the liability stage of this employment discrimination action, the District Court determined that defendants' well intentioned policies, adopted in good faith, had a disparate impact on blacks in violation of Title VII. At the relief stage, it entered an injunction which included relief against subjective discrimination in hiring in violation of both Title VII and 28 U.S.C. § 1981. The Court of Appeals ruled that the challenged subjective discrimination had to be tested against the standards of disparate treatment, not disparate impact. It therefore held that a class-wide intent to discriminate was necessary to sustain the relief at issue. The question presented is whether, in going on to sustain the relief, the Court of Appeals acted in contravention of the subsequent decision of this Court in *Pullman-Standard v. Swint* by treating the issue of defendants' intent to discriminate as one of ultimate fact not subject to the clearly erroneous standard of Fed. R. Civ. P. 52(a), and by substituting its own new finding that defendants had the requisite intent for the District Court's contrary finding.

PARTIES

Petitioners Baxter Travenol Laboratories, Inc. and Travenol Laboratories, Inc. are corporations organized under the laws of Delaware. (All of their domestic subsidiaries are wholly-owned.) Respondents are a class of black females who were employed at petitioners' facility in Cleveland, Mississippi on or after March 2, 1966, and black females with a tenth grade education or equivalent who applied for employment at this facility on or after March 2, 1966.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi, Delta Division, on petitioners' liability is reported at 416 F. Supp. 248, and appears in the Appendix at pages 1a-30a. The opinion of the United States Court of Appeals for the Fifth Circuit affirming in part and reversing in part is reported at 565 F.2d 895, and appears in the Appendix at pages 31a-37a. This Court's denial of a petition for certiorari is reported at 439 U.S. 835. The District Court's order

on relief from which the present petition arises is not reported and appears in the Appendix at pages 38a-45a. The opinion of the Court of Appeals regarding this order is reported at 673 F.2d 798, and appears in the Appendix at pages 46a-117a. The Court of Appeals' denial of petitioners' petition for rehearing and respondents' petition for rehearing and suggestion for rehearing *en banc* appears in the Appendix at page 118a.

JURISDICTION

The judgment sought to be reviewed was entered on April 22, 1982, and petitions for rehearing were denied on July 6, 1982. Jurisdiction of this Court is invoked under section 1254(1) of Title 28, United States Code.

STATUTES AND RULES INVOLVED

Federal Rules of Civil Procedure, Rule 52(a):

> Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of

law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Civil Rights Act of 1964 (Title VII), section 702(a):

Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer ——

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

On March 2, 1972, three blacks commenced this class action pursuant to the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981, alleging race discrimination in petitioners' ("Travenol") hiring, assignment, promotion and disciplinary practices. Jurisdiction existed in the District Court under 28 U.S.C. § 1331. On May 1, 1973, the District Court granted respondents' ("plaintiffs") motion to amend the complaint to include allegations of sex discrimination.

Pursuant to Fed. R. Civ. P. 23, the District Court defined the following class before trial:

> All present, past, and future black female employees and all present, past, and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

416 F. Supp. 248, 253 (App. 5a-6a).

A bench trial commenced on March 3, 1975. With regard to hiring, plaintiffs strived principally to prove that Travenol's requirement that production ("operative") employees have a tenth grade education or equivalent resulted in discrimination against the class. Plaintiffs also asserted that Travenol's interviewing procedures resulted in discrimination.

On February 19, 1976, the District Court rendered a Memorandum of Decision discussing various aspects of Travenol's personnel practices. The court found that Travenol hired

proportionately fewer blacks as operatives, "reflect[ing] the combined effect of a tenth grade education requirement and of the defendants' subjective discrimination." 416 F. Supp. 248, 257 (App. 14a). The court stated no finding that Travenol had an intent to discriminate. It did find that Travenol's management was "well intentioned" but that its policies "adopted in apparent good faith have had the effect of impeding the entry of blacks into the work force." 416 F. Supp. 248, 261 (App. 21a). The court made additional findings as to other allegations of discrimination.

The District Court issued an injunction which, by paragraph number, prohibited Travenol from (1) discriminating against the class on the basis of color, race or sex in employment practices or conditions of employment, (2) requiring a tenth grade education of applicants for employment in operative positions, (3) requiring a twelfth grade education as a condition of employment in office and clerical, technician, and supervisory positions, and (4) requiring a college degree as a qualification for certain analyst positions. A fifth, unnumbered paragraph required Travenol to provide employee coverage for pregnancy and pregnancy-related disabilities in its salary continuation plan.

Travenol noticed an appeal to the Court of Appeals for the Fifth Circuit from the Memorandum of Decision and the injunction. Upon plaintiffs' motion the Court of Appeals dismissed all aspects of the appeal except as to the injunction.

The Court of Appeals issued its opinion and judgment on January 6, 1978. *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (App. 31a-37a). It vacated paragraph (1) of the injunction for failure to satisfy the specificity requirements of Fed. R. Civ. P. 65(d), and vacated paragraph (2) because none of the named plaintiffs had standing to challenge the tenth grade requirement. The court affirmed paragraphs (3) and (4) relating to the twelfth grade and college education requirements, respectively, and upon the parties' joint request, vacated the paragraph relating to pregnancy and pregnancy-related disabilities. The court denied plaintiffs' petition for rehearing and suggestion for rehearing *en banc*, and this Court denied plaintiffs' petition for certiorari. 439 U.S. 835.

Following remand the District Court referred to a special master the issues of "the necessity for and extent of any further injunctive relief," and of entitlement to back pay and its computation. The special master issued his report and recommended decree after additional discovery and a hearing. As to hiring, the decree prohibits Travenol from discriminating subjectively on the basis of race or sex, and requires it to post notices describing job vacancies. It requires Travenol to grant a hiring priority to all unhired class members who seek it, and establishes procedures for class members to claim constructive seniority. The District Court overruled the parties' various objections and adopted the special master's report and decree. (App. 38a-45a).

The parties each noticed an appeal to the Court of Appeals. Travenol challenged the decree as to both its form and the absence of requisite findings as to discrimination in the District Court's February 19, 1976 Memorandum of Decision, upon which the decree was based. Plaintiffs appealed the District Court's denial of additional injunctive relief.

The Court of Appeals required several adjustments in the form of relief, and moved back the opening dates for membership in the class. In holding that Travenol's interviewing system was a means of discrimination in hiring, the court ruled that proof of intent to discriminate was "crucial" and went on to determine that the record established Travenol's discriminatory intent.[1] Travenol petitioned for a rehearing solely on the point that the Court of Appeals erred by independently reviewing Travenol's intent and reversing the District Court's finding. The Court of Appeals denied this petition, as well as plaintiffs' petition for rehearing and suggestion for rehearing *en banc*. (App. 118a).

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[1] This contrasted with its reversal of the District Court's award of constructive seniority to class-member applicants between January 1975 and February 19, 1976. As to that aspect, the Court of Appeals remanded for the District Court to make findings whether or not Travenol discriminated in hiring during this period.

REASON FOR ALLOWING THE WRIT

THE COURT OF APPEALS MADE AN INDEPENDENT FINDING THAT TRAVENOL INTENDED TO DISCRIMINATE IN HIRING WITHOUT REGARD TO THE "CLEARLY ERRONEOUS" STANDARD, CONTRARY TO THIS COURT'S DECISION IN *PULLMAN-STANDARD V. SWINT*

This Court's decision in *Pullman-Standard v. Swint*, ____ U.S.____, 50 U.S.L.W. 4425 (U.S. April 27, 1982), establishes that the Court of Appeals erred by rejecting the District Court's finding that Travenol was "well intentioned" without regard to the "clearly erroneous" standard of Fed. R. Civ. P. 52, and by substituting its own new finding that Travenol intended to discriminate. In *Swint* the Court held that the clearly erroneous standard applies to all findings of fact, and deemed erroneous the rule of the Court of Appeals for the Fifth Circuit that the standard does not apply to ultimate facts. The Court stated,

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

50 U.S.L.W. at 4429.

The District Court in *Swint* found that a seniority system was established without an intention to discriminate, and thus was within the proviso to Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1977). The Court of Appeals ruled that the District Court erred, and determined that the seniority system was created with an intent to discriminate. The court did not apply the clearly erroneous standard to the District Court's contrary finding. Rather, it considered the question of intent

one of ultimate fact which it was free to review independently. The Supreme Court ruled that this was error and that the clearly erroneous standard should have been applied. It stated,

> Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Insofar as the Fifth Circuit assumed otherwise, it erred.

50 U.S.L.W. at 4429-30.

The Court of Appeals determined in the present case that plaintiffs were required to prove that Travenol's interviewing process led to disparate *treatment* which, in turn, requires proof of intent to discriminate. The court initiated its discussion of Travenol's hiring practices with a recitation of how plaintiffs had directed their efforts at trial principally to establishing a disparate *impact* of the tenth grade requirement (for which proof of intent is not required), and noted the District Court's finding that Travenol hired proportionately fewer blacks —" 'reflect[ing] the combined effect of a tenth-grade requirement and of the defendants' subjective discrimination.' 416 F. Supp. at 248." 673 F.2d at 816 (App. 67a). The court continued that its prior decision that the plaintiffs lacked standing to challenge the tenth grade requirement resulted in the removal of this issue and "transformed this case dramatically" into a disparate treatment case, in which proof of intent to discriminate is "crucial." *Id.*

This crucial finding of intent to discriminate is not to be found in the District Court's opinion. Understandably. The District Court had proceeded on a disparate impact basis, which did not require proof of intent. But what is more important, the District Court had reached its conclusion of liability on an impact basis in the face of its express recognition that Travenol did not have an intent to discriminate. Indeed, the District Court found specifically that defendants did *not* intend to discriminate:

> The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well intentioned management attempting to deal with job applicants and employees, equally on a case by case, or individual basis; however, the employment policies which defendants adopted in apparent good faith have had the effect of substantially impeding the entry of blacks into the company's work force.

416 F. Supp. at 261 (App. 21a).

The Court of Appeals did not address this finding that Travenol was "well intentioned." Nor did it or could it point to language elsewhere in the District Court's Memorandum of Decision which could be considered a finding of discriminatory intent. It simply held that plaintiffs had proved a prima facie disparate treatment case. It did so by referring to statistics showing a disparate result, combined with an early history of discrimination, "opportunities in [the] ... hiring process to discriminate," and discrimination against the three named plaintiffs. 673 F.2d at 819 (App. 73a). It assessed the evidence of disparate result by applying the "clearly erroneous standard to the district court's *subsidiary* findings of fact." 673 F.2d at 820 (App. 75a) (emphasis supplied).[2] The court inferred from these subsidiary findings the otherwise absent element of intent, treating it as an ultimate fact, which under the rule of the circuit at the time it was free to review as if a question of law. (See the court's citations (673 F.2d at 820 (App. 75a)) to *Rivera v. City of Wichita Falls*, 665 F.2d 531, 535-36 (5th Cir. 1982); and *Danner v. United States Civil Service Commission*, 635 F.2d 427, 430-31 (5th Cir. 1981), examples of the court's application of different standards of review to subsidiary and ultimate facts.) This substitution of a new finding of intent inferred as it

[2] In so doing, the court referred to three statistical compilations. One, set forth in footnote 32 of the opinion, had been introduced in evidence in exhibit form. The other two, in footnotes 33 and 34, were charts presented as such for the first time in plaintiffs' appellate briefs. 673 F.2d at 820 (App. 77a).

must have been from subsidiary facts is impermissible under *Swint*. All the more so when the District Court had expressly made a contrary finding on the precise issue.

The Court of Appeals upheld injunctive relief against subjective discrimination by applying a different standard from the District Court. That different standard, disparate treatment, required a finding, intent, not required by the impact standard of the District Court and contrary to its finding on this precise question. As in *Swint*, the Court of Appeals substituted its factual finding for that of the District Court in order to support the legal conclusion it determined to reach. The Court of Appeals should have instead tested the District Court's finding on the intent question by the clearly erroneous standard of Rule 52. Travenol's petition for certiorari should be granted. The judgment below should be summarily vacated and the matter remanded for reconsideration in light of *Swint*. *White-Wilson Medical Clinic v. Robbins*, ____ U.S. ____, 50 U.S.L.W. 3915 (U.S. May 4, 1982).

CONCLUSION

In light of *Pullman-Standard v. Swint,* the petition for a writ of certiorari should be granted, the judgment below summarily vacated, and the matter remanded for reconsideration. Should the Court regard summary action as inappropriate, the writ should be granted for all of the reasons set forth above.

Respectfully submitted,

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United States District Court,

N. D. MISSISSIPPI,
DELTA DIVISION

No. DC 72-13-S

WILLIE MAE PAYNE, *et al.*,
Plaintiffs,

v.

TRAVENOL LABORATORIES, INC., *et al.*,
Defendants.

FEB. 19, 1976.

MEMORANDUM OF DECISION

ORMA R. SMITH, *District Judge.*

Following a two-week bench trial, this employment discrimination action is now before the court for decision on the merits.

The suit was commenced March 2, 1972, by the filing of complaint by three individual plaintiffs seeking to represent a class of persons allegedly subjected to racial discrimination at the hands of the defendants. The scope of the plaintiff class was subsequently broadened by the addition of allegations of sex discrimination. Of the original named plaintiffs, one was a black, male employee at defendants' Cleveland, Mississippi, facility and two were black, female applicants for employment at the defendant's Cleveland plant.

Defendants in the case are Travenol Laboratories, Inc., and Baxter Laboratories, Inc. Because Travenol is a wholly-owned subsidiary of Baxter, the court will make no attempt to differentiate between the defendants and will refer to them

indiscriminately as "Travenol", "Baxter", or simply "the defendants".

The course to trial and determination on the merits was long and arduous. During the months following the filing of complaint, the court was required to rule upon a motion to strike jury demand (which was granted), a motion to certify as a class action (which was granted), a motion to dismiss and/or for summary judgment (which was denied), a motion for a preliminary injunction (which was denied) and various other motions concerning discovery and the substitution of parties. On or about November 15, 1973, counsel approached the court and requested proceedings in the case be held in abeyance pending the outcome of settlement negotiations. Negotiations dragged on until June of 1974, at which time they collapsed.

During the summer of 1974, the parties resumed vigorous discovery. The court bifurcated the trial of the case, deferring consideration of the appropriate relief to be afforded plaintiffs, if any, until after the court had determined if defendants' conduct about which plaintiffs complained is or was in contravention of Title VII of the Civil Rights Act of 1964.[1] The liability portion of the trial began March 3, 1975, and concluded March 14, 1975. However, the end of the trial unfortunately did not mark the end of the litigation of the matter of liability. Voluminous and time-consuming post-trial motions filed on behalf of both plaintiffs and defendants required disposition by the court prior to consideration of the merits.

In the course of the three-year period between filing of complaint and commencement of trial, the cast of the named plaintiffs changed substantially. Two of the original named plaintiffs, James Williams and Alma Jean Williams, sought and received permission of the court to withdraw as parties. Willie Mae Payne remains the only original named plaintiff in the lawsuit. In 1973, the court sustained a motion for leave to intervene filed on behalf of Delilah Cherry and Birdie Griffin.

[1] 42 U.S.C. § 2000e *et seq.*

Thereafter, the case proceeded to trial with Ms. Payne, Ms. Cherry, Ms. Griffin, and the class which they represent opposing the defendants, Travenol and Baxter.

Although she has since moved to Chicago, Illinois, Willie Mae Payne was, at the times pertinent to the issues now before the court for determination, a black female resident of the Cleveland, Mississippi area in which the defendants' facility is located. There was some controversy as to when Ms. Payne initially applied for employment at the Baxter plant; however the parties have stipulated that she did so at least as early as March 17, 1970. Although Ms. Payne has no more than seven years of formal schooling, she obtained a tenth grade rating on the General Educational Development (GED) test on January 19, 1970. Ms. Payne was never hired by the defendants.

Delilah Cherry is a black female resident of the Cleveland, Mississippi area. At the time Ms. Cherry claims she was subjected to discrimination at the hands of the defendants, she had completed only eight years of formal education and had obtained a certificate of tenth grade equivalency on a GED test in 1967. Although she initially sought employment at the Baxter plant at least as early as 1970,[2] Ms. Cherry had no success in obtaining a job with the defendants until some time after the institution of the instant litigation. She is presently employed by the defendants.

There was a degree of confusion as to the facts surrounding the claim of plaintiff Birdie Lee Griffin. Prior to trial, counsel stipulated as to certain facts concerning Ms. Griffin. When Ms. Griffin testified at the trial, it developed from her testimony that

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[2] As will be discussed in greater detail *infra*, until November 5, 1971, the personnel department at Travenol would consider job applications only from persons who were referred to them from the local office of the state employment service. The attempts of Ms. Cherry and Ms. Payne to secure employment at Travenol were initially thwarted by the refusal of the employment service to refer plaintiffs to defendants. Ms. Payne and Ms. Griffin went to the state employment office initially to seek employment at Travenol. Ms. Cherry went directly to Travenol in the first instance but was instructed that defendants hired only employment service referrals. The plaintiffs were ultimately referred to Travenol, but only Ms. Cherry was successful in obtaining employment.

the Birdie Lee Griffin who was the subject of the stipulations was the daughter and namesake of the Birdie Lee Griffin who was a witness and party in this cause. Accordingly, the facts set forth in the stipulations as to Ms. Griffin have no application to this lawsuit.

The correct facts, as the court finds them to be from her testimony at trial, are that Birdie Lee Griffin is a forty-eight year old black woman currently residing in the Cleveland, Mississippi area. Ms. Griffin completed eleven years of formal education and has attained a twelfth-grade equivalency on the GED. Ms. Griffin first applied for a job with Travenol in 1966. Although she was referred to Baxter by Mississippi State Employment Service (MSES), Ms. Griffin was never offered a job at the Cleveland plant.

Each of the named plaintiffs filed discrimination charges with the Equal Employment Opportunity Commission (EEOC). Ms. Payne lodged two charges, one each in February and March of 1970. Named as respondents in these charges were Baxter Laboratories and MSES. These charges related primarily to Travenol's education requirement, the use of MSES as an exclusive source of applicants, and claims of racial discrimination. The EEOC investigated Ms. Payne's allegations and, on March 15, 1971, issued findings of fact to the effect that reasonable cause existed to believe that Baxter's practices resulted in discrimination against blacks substantially as alleged by Ms. Payne. A right to sue letter was issued Ms. Payne on December 28, 1971, as to MSES, and on September 6, 1972, as to Baxter.

Ms. Cherry also filed two charges with the EEOC naming Baxter and MSES as respondents. The first charge, lodged August 14, 1970, inferred that white job applicants at the Travenol plant were preferred to black. The second charge, signed by Ms. Cherry on January 12, 1971, contained only the simple allegation that Travenol refused to hire Ms. Cherry because she is black. The EEOC investigation conducted in response to Ms. Cherry's charges resulted in a finding that reasonable cause existed to believe Travenol was then engaged in unlawful employment practices. This finding was based

almost entirely upon Travenol's requirement that each job applicant possess at least a tenth grade education or an equivalent score on the GED test. A right to sue letter was issued to the attorney for Ms. Cherry by EEOC on June 6, 1973.

Ms. Griffin filed two charges against Baxter with the EEOC. The first was received by the Commission on August 28, 1970, and the second was executed by Ms. Griffin on January 12, 1971. Both of Ms. Griffin's charges related to racial discrimination. She received a right to sue letter, through her attorney, from EEOC on June 6, 1973.

In their complaint, plaintiffs sought injunctive relief and damages in the nature of back-pay to remedy what they allege is defendants' past, present, and future discrimination against blacks and women. Plaintiffs maintain that the defendants' use of the tenth grade education requirement violates Title VII insomuch as the requirement has a distinctly disparate effect on blacks in the Cleveland, Mississippi area and cannot be justified as a business necessity. Plaintiffs also attack what they claim was defendants' practice of restricting the better-paying jobs to male employees. In conjunction with this allegation, plaintiffs maintain that the preservation of separate seniority rosters in the two classifications of defendants' production-line workers[3] discourages inter-job transfers and perpetuates the effects of past discrimination. Plaintiffs also included in the complaint a charge that the manner in which Travenol management hires and promotes its clerical and professional staff unlawfully discriminates against blacks.

As was indicated earlier, the court certified this action as one which may be maintained on behalf of a plaintiff class as required in Fed.R.Civ.P.23(c) and tentatively defined the class as follows:

> All present, past, and future black female employees and all present, past, and future black female applicants for employment at the facility operated by

[3] As will be discussed in greater detail *infra*, Travenol groups its production line workers into "assemblers" and "material handlers". The proof in the case shows that material handlers are substantially better paid than assemblers.

> the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

Although perhaps not strictly necessary, the court deemed it desirable that, pursuant to Fed.R.Civ.P. 23(c)(2), notice be furnished members of the above-defined class. The notice was through the mail to those whose identities were known to plaintiffs' counsel, and through publication to those unknown to counsel. It appears that approximately 1300 class members received notice of the pendency of the action through the mailing. Because some of the responses to the notice evince as apparent misunderstanding as to the basic nature of the matter, both plaintiffs and defendants moved the court to require some additional or supplemental notice to prospective class members. Defendants sought to have the court modify the class notice from the "opt-out" to the "opt-in" form. Plaintiffs requested a "clarifying notice" be sent to each of the approximately 400 members of the plaintiff class who had responded to the court's original notice by seeking exclusion from the class. The court determined to follow neither course proposed by counsel but, instead, entered an order deferring consideration of the advisability of requiring an additional class notice until such times as the question of the defendants' liability has been resolved.

RACE DISCRIMINATION

Baxter's involvement in Mississippi began in 1950, when, pursuant to a legislative program of the State of Mississippi designed to encourage the immigration of industries into the

state (Balance Agriculture With Industry—BAWI), the defendants established a facility in Cleveland, Mississippi. Construction and periodic expansion of the Cleveland plant was financed in part through bonds issued by the City of Cleveland under the BAWI program. Approval by the city voters was a prerequisite to participation in the BAWI program. A good relationship between Travenol management and employees and the political, economic, and social leaders of the community was therefore essential to the successful operation of the Travenol plant in Cleveland.

From the commencement of operations in 1950, the defendants' Cleveland plant has manufactured, processed, packaged, and distributed drug and pharmaceutical products, with an emphasis on parenteral fluids and intravenous solutions. These products are used by hospital and medical facilities throughout the Mid-South.

Travenol's products are packaged and labelled on an assembly line along which the bottles are filled with various solutions. Production line workers are referred to as "assemblers". Assembler positions by and large involve the filling, capping, labelling, and inspection of bottles as they move along the production line. A second type of production line worker is known as a "material handler". The material handler job consists primarily of coordinating the flow of materials along the assembly line and the distribution of materials to various work stations along the line in accordance with production schedules.

Of the approximately 1200 persons employed at the Travenol plant in Cleveland, some 900 occupy either assembler or material handler positions.

The employment practices attacked in the complaint have evolved since defendants' Cleveland facility began operation in July of 1950. From 1950 until 1966, Mr. Olin Taylor was employed as personnel manager at the plant. During this period, he personally hired all custodians, material handlers, and assemblers. During his tenure as personnel manager, Mr. Taylor received no written instructions from Baxter management as to the standards which he was to employ in deciding

which applicants to hire. His decisions were based mainly upon subjective factors and community references or recommendations played an important role in the hiring process. The most frequent source of references and recommendations was the industrial development committee of the Cleveland Chamber of Commerce. There were no blacks on this committee during the periods when it made references or recommendations. References were given heavy emphasis until the late 1950's or early 1960's, at which time their importance began to decline.

When Mr. Taylor began to rely less upon community references and recommendations in the late 1950's or early 1960's, he concurrently began to rely more heavily upon his own subjective judgment in determining whether to accept an applicant for employment. One of these subjective factors was Mr. Taylor's belief that close relatives of an employee with a good record would likely be good employees and, conversely, close relatives of an employee with a poor work record would likely be poor employees.

Prior to 1964, the defendant's work force was composed entirely of whites except for custodial or janitorial jobs. This exclusion of blacks from noncustodial jobs was based in part upon conformity to local racial traditions.

At some point during 1964, and subsequent to the passage of Title VII, Mr. Taylor requested the Cleveland office of MSES to perform a survey of the noncustodial jobs at the Travenol plant and to recommend changes or alterations to the hiring process which would bring blacks into noncustodial positions and jobs as operatives on the production line. Following their study, MSES recommended that the defendants impose a requirement that prospective applicants possess at least a twelfth grade education. Mr. Taylor rejected this recommendation as too restrictive and, instead, Travenol adopted a tenth grade standard for prospective employees. A tenth grade GED equivalency would also satisfy this requirement.

At the time of the imposition of the tenth grade requirement, February of 1965, Travenol employed four blacks as material handlers. Each had been promoted from a custodial

position to a position on the production line. The defendants had not, prior to 1965, initially hired any blacks as operatives.

In February 1965, Mr. Taylor determined to use MSES as the exclusive referral source for applicants for assembler and material handler positions at the Travenol plant. Prospective employees directly contacting the personnel office at the plant were instructed to report to the MSES office to initiate the application process, inasmuch as the personnel department would not consider an applicant not referred by the Cleveland office of MSES.

Prospective employees satisfying the MSES standards, including the tenth grade requirement, were referred to the Travenol plant for an interview with Mr. Taylor. The impression which Taylor gained at this interview, coupled with the recommendation of plant employees, determined the applicant's success or failure in landing a job with Travenol. Between 1965 and 1971, the defendants customarily contacted one of their black employees, Julius Lucas, to ascertain his opinion of prospective black employees.

In 1967, Mr. Taylor was succeeded as personnel manager by James K. Lesley. Mr. Taylor supplied Mr. Lesley with the names of persons in the local community who could serve as references for job applicants. Lesley's tenure with Travenol was brief, terminating in April 1968. Mr. Lesley was succeeded as personnel manager by James E. Self on July 15, 1968. Mr. Taylor, who was still in defendant's employ, did not give Mr. Self instructions as to how to conduct interviews with applicants since he considered Mr. Self's background in personnel matters sufficient for performance of the duties of personnel manager at the plant. Mr. Self served as personnel manager at the Cleveland plant from July 15, 1968 to August 31, 1974.

During Mr. Self's tenure, hiring decisions as to persons referred by MSES were based primarily on subjective factors. The qualifications considered included personal cleanliness, general alertness, and comprehension. The personnel manager did not have one set of interview questions which he used in each and every interview, the questions asked varied among the applicants.

Although Travenol abandoned its policy requiring that all applicants for jobs as operatives be referred by MSES in the Fall of 1971,[4] it has continued in effect the Tenth grade education requirement for operatives on the production line.

The greater portion of the evidence offered at the trial, including expert testimony, tables, and statistical displays, was addressed to the issue of the effect of the tenth grade education requirement. Statistics of all kind and expert analysis of statistical evidence ad infinitum were received into evidence. The voluminous nature of the documentary evidence thus introduced, as well as counsels' heated debate as to the proper interpretation of each item in evidence tended to confuse rather than enlighten. To engage in an extensive discussion of the evidence in this regard would result in an opinion beyond all reasonable bounds. Accordingly, the court's discussion of the issue will be brief and to some extent conclusory.

RACIAL EFFECT OF TENTH GRADE EDUCATION REQUIREMENT

Lamentations aside, it falls to the court to determine, in reverse order, whether the defendants' educational requirement has been "shown to be significantly related to successful job performance" and whether the requirement "operate[s] to disqualify Negroes at a substantially higher rate than white applicants". *Griggs v. Duke Power Co.*, 401 U.S. 424, 426, 91 S.Ct. 849, 851, 28 L.Ed.2d 158, 161 (1971).

Because there are no available U.S. Census Bureau figures showing the number of blacks and whites in Mississippi with ten or more years of education, the parties stipulated that the relative racial effect of the tenth grade requirement used by defendants is as great as the relative effect of a ninth grade requirement. Using the ninth grade figures, the 1970 census

[4] In response to information received by defendants' attorneys to the effect that a lawsuit would soon be initiated charging that MSES's Cleveland office referred job applicants in a racially discriminatory manner, defendants notified MSES on November 5, 1971, that Travenol would no longer utilize the services of MSES.

report for the State of Mississippi clearly shows the education requirement has a substantially disproportionate adverse effect upon blacks. In the county in which defendant's plant is located, for example, 81.6% of the black males in the county over 25 years of age had less than 9 years of education. Of the black females in the county over 25, 72.9% had fewer than 9 years of education. The comparable figures for whites were 29.6% for males and 20.8% for females.

Defendants' only attempt to blunt the effect of the Census Bureau figures was to speculate that the educational gap between blacks and whites would be considerably narrower if figures were available which included GED equivalencies in addition to formal education. No concrete proof was offered in support of this contention and the court is not inclined to believe, absent some showing, that blacks would avail themselves of the GED program to a greater extent than whites in numbers so large as to significantly reduce the great disparity apparent in the Census Bureau figures. Considering all the evidence, the court has concluded that plaintiffs have shown in a most convincing manner that Travenol's tenth grade or equivalency requirement disqualifies substantially more black applicants than white.

As might be expected, the majority of proof introduced by defendants was in support of their assertion that the nature of the product manufactured by them at their Cleveland plant dictates a literate and alert work force, a condition which can be assured only through use of a screening process which includes the tenth grade education requirement. Simply stated, defendants claim the requirement is a business necessity. In the opinion of the court, the proof in the case shows otherwise.

Assemblers and material handlers work from place to place on the production line and must be familiar with each job involved. They are required, at times, to keep records and to add, subtract, and multiply. They must be alert, attentive, flexible and must be able to read, with an understanding of what they have read, and to follow instructions. Generally, material handlers and assemblers learn their respective duties

from on-the-job training. The parties stipulated that the operative positions do not require any particular sort of previous employment on the part of the incumbent.

It is defendants' position that the high speed of the production line on which the bottles are filled with the intravenous solutions requires a particular alertness and attentiveness on the part of the employee assigned to line operations. Decisions affecting quality must be made quickly as the production line progresses. Accordingly, defendants maintain that operatives must possess sound judgment in order to appreciate the potential consequences of their actions.

Because of the nature of their product and its intimate effect on human life, Travenol management has made every attempt to build quality control consciousness into each job at the plant. The potentiality for disaster inherent in a mislabelled product in the drug industry dictates use of the tenth grade requirement as a necessary and effective screening device for the selection of competent employees, so defendants argue. Turning again to *Griggs*, the court finds the following language from that opinion highly instructive on this point:

> "Nothing in [Title VII] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." 401 U.S. at 436, 91 S.Ct. at 856, 28 L.Ed.2d at 167.

After a full consideration of all of the evidence on the issue, the court is of the opinion, and so holds, that Travenol's tenth grade educational requirement does not measure the person for the operative job at its Cleveland plant.

Every condition of liability set forth by the Court in *Griggs* is to be found in this case. That is, the operative jobs at defendants' plant were reserved exclusively for and occupied exclusively by whites prior to passage of Title VII. The education requirement without question has a substantially more adverse effect upon black applicants than upon white applicants. And, from a familiarity with the nature of the operative jobs at the Travenol plant acquired through two weeks of hearings on the matter, the court is convinced the educational requirement has not been "shown to be *significantly* related to successful job performance." *Griggs, supra,* 401 U.S. at 426, 91 S.Ct. at 851, 28 L.Ed.2d at 161 [emphasis added].

In concluding that the education requirement is not job related, the court considers it highly pertinent that the standard was not adopted until the defendants began desegregating their work force in order to comply with the Civil Rights Act of 1964. *United States v. Georgia Power Co.,* 474 F.2d 906, 912 (5th Cir. 1973).[5] Although the Cleveland plant had operated successfully for more than fifteen years without an educational policy of any sort in regard to the employment process, in 1965 Travenol determined to establish the tenth grade requirement for all noncustodial jobs, including the assembler and material handler positions which make up more than three quarters of Travenol's entire work force.

The court is also assisted in reaching a decision on the legality of defendants' education requirement by consideration of the EEOC's own guidelines concerning educational prerequisites for employment.[6] Application of the EEOC's inter-

[5] Although not cited as frequently in this opinion, the *Georgia Power* opinion was actually of more benefit to the court in determining the merits in this case than was the *Griggs* opinion. First, the defendants in *Georgia Power* actually presented a business necessity defense, something which was merely contemplated by the Court in *Griggs*. Second, the *Georgia Power* opinion dealt specifically with a minimum education requirement, 474 F.2d at 918-19, whereas *Griggs* dealt principally with a requirement of a minimum score on an ability test.

[6] "The administrative interpretation of [Title VII] by the [EEOC] is entitled to great deference." *Griggs, supra,* 401 U.S. at 433-34, 91 S.Ct. at 854, 28 L.Ed.2d at 165.

pretation of Title VII to the facts in the case at bar, as the court finds them to be, likewise compels a holding that use of the tenth grade requirements constitutes unlawful discrimination against black applicants or prospective black applicants at defendants' Cleveland facility. 29 C.F.R. § 1607.1 *et seq.*

The court's holding is not to be interpreted as precluding defendants from adopting methods of testing or other measuring procedures to predict an applicant's ability to effectively perform the duties of an operative at defendants' plant. The court appreciates the fact that personnel assigned to these positions must be able to read with some degree of comprehension and be capable of performing certain mathematical calculations. However, where, as here, the crude benchmark selected by an employer to insure employees possess the ability to read and write and add and subtract operates to substantially and disproportionately burden minority applicants and has been shown to relate to job performance in only the most remote sense, use of that benchmark is proscribed by Title VII.

THE OVERALL EFFECT OF DEFENDANTS' HIRING PRACTICES FOR OPERATIVE POSITIONS

The record reflects that once an applicant for an operative job at Travenol has hurdled the tenth grade barrier, the hiring decision is based primarily on subjective factors. These job decisions are made by defendants' personnel managers without written instructions or directives from corporate headquarters. Among applicants for these positions who met the requirement of referral by MSES while it was in effect, the defendant hired proportionately fewer blacks. Defendants' records reflect that for the period from April, 1971 through August, 1974, one of every three white applicants for operative positions at Travenol was hired, but only one of every six black applicants was hired. This disparate result reflects the combined effect of a tenth grade requirement and of the defendants' subjective discrimination.

The defendants' records indicate that in May, 1964, all operatives were of the white race. By March of 1966, more than a year after the implementation of the tenth grade

education requirement and nearly two years after the passage of the Civil Rights Act of 1964, the defendants' operative force was still approximately 84% white. In February of 1969, the picture had not changed to any substantial degree and 82% of the male operatives were white while 89.8% of the female operatives were white. In March, 1970, during the period in which the EEOC charges which are pertinent to this case were lodged against defendants and at a time when the charges were under investigation by the EEOC, the company's records show that 76.6% of the male operatives were white and 82.8% of the female operatives were white.

The racial makeup of Travenol's operative force changed significantly between 1970 and 1973. By March of 1973, 54.1% of the male operatives were white and 70.1% of the female operatives were white. The court cannot ignore the implication that the real incentive for the meaningful progress in integration of the operative work force which the defendants achieved between 1970 and 1973 was furnished by the plaintiffs' charges with the EEOC and the subsequent institution of this lawsuit.

By February of 1974, 37.4% of the defendants' male operatives were white as were 57.5% of the female operatives. The 1970 Census Report indicates that in Bolivar County white comprised 52.2% of the male population 18 years of age and older and 46.2% of the female.

While the above figures disclose a commendable degree of progress by the defendants, especially in the very recent past, in bringing blacks into the operative work force in numbers approaching the racial composition of the community, they also disclose significant underrepresentation of blacks in the operative work force during the early years in dispute in this case, 1970 and 1971.

TWELFTH GRADE REQUIREMENT

The defendants presently require a twelfth grade education for all office and clerical jobs, which include mail room duplicating clerk, telephone operator/receptionist, secretary, inventory clerk, accounting clerk, steno-clerk, and keypunch

and data processing operator. The twelfth grade education requirement also applies to all technician jobs in the plant, including maintenance scheduler, molding technician, release coordinator, release coordinator (solutions), pharmaceutical chemical laboratory technician, chemical plant laboratory technician, standard technician in the industrial engineering department and molding specialist. Also subject to the twelfth grade requirement are apprentice mechanic jobs of all kinds, although the requirement does not apply to persons who have completed a course of training in a vocational-technical school, or to persons with military experience in mechanical fields. All supervisory jobs, from group leader up, require a high school diploma, including the operative supervisors.

The defendants have not validated, in accordance with the EEOC or the Office of Federal Contract Compliance (OFCC) guidelines, the twelfth grade education requirement now in effect at their Cleveland plant.

Although there is a substantial turnover among office and clerical employees, these jobs have, since the opening of the plant, been held exclusively or disproportionately by whites. The precise date of the adoption of the twelfth grade requirement is unclear; however, it was adopted sometime subsequent to passage of the Civil Rights Act of 1964. Incumbent employees are not required to satisfy the education requirement as a condition of continued employment. It goes without saying that the beneficiaries of that policy were and are overwhelmingly white.

The court must, of course, approach the issue of whether defendants' high school diploma requirement contravenes Title VII in the same manner as the legality of the tenth grade requirement was approached.

The question of whether the diploma requirement operates to disqualify blacks in substantially greater numbers than whites is, as was the same inquiry regarding the tenth grade standard, easily resolved. In Bolivar County in 1970, this requirement disqualified 91.9% of black males over 25 and 88.9% of the black females over 25, but only 47.2% of white males and 41.9% of white females of this age. As with the tenth

grade requirement, there is no evidence that such a large number of black persons possess twelfth grade equivalencies or GED diplomas, relative to whites possessing such credentials, so as to eliminate or reduce the disproportionately adverse impact of this requirement on blacks.

In response to an interrogatory propounded to them by plaintiffs, defendants outlined the duties of the office and clerical workers of whom a high school diploma is required. These positions include telephone operator/receptionist, key punch and data processing operator, secretary, and mail room and duplicating clerk. Upon close examination of these duties, it does not appear to the court that there is a tangible relationship between the duties of the great majority of defendants' office and clerical staff and any particular level of education. This is especially so regarding the duties of the telephone operator/receptionist and the mail room and duplicating clerk. Lack of a diploma would not conclusively demonstrate that an applicant failed to possess the qualifications necessary to efficiently fulfill the duties of office and clerical workers in defendants' employ, just as possession of a twelfth grade education would not of itself demonstrate that an applicant is qualified for one of these jobs.

Since the institution of the high school diploma standard, the defendants have not considered the use of any alternative to that particular requirement as a screening device. In view of the grossly disparate effect of the requirement on the black members of the labor pool in the Cleveland, Mississippi area the court cannot condone its continued use absent some efforts by defendants to discover and employ some other effective standard with a more racially neutral impact.[7]

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[7] Although it appears that the education requirement was not completely to blame, defendants' office and clerical work force was overwhelmingly white as late as six months prior to trial. Between April 1, 1971 and August, 1974, seventy-eight whites and forty-one blacks applied for office or clerical jobs at the Cleveland plant. Ten of the one hundred nineteen applicants were ultimately hired. All ten were white. Between the opening of the defendants' plant in 1950 and August of 1974, no black was hired for an office or clerical job. Defendants have, since 1966, integrated their office and clerical work

(footnote continues)

Defendants also require a high school diploma of those employees who will be considered for promotion to supervisory positions and of those applicants for employment in technician jobs at defendants' plant. Regarding the technician job, defendants maintain that the education requirement is essential to ensure the persons hired for those positions possess the qualities necessary to successfully discharge the duties of the job. The qualities which defendants claim they seek in persons to be employed as technicians are alertness, judgment, comprehension, adaptability, responsibility and initiative. Defendants further argue that their supervisors must possess the same attributes as technicians plus a certain degree of leadership ability in order to effectively perform their duties.

Although there is no doubt that possession of the aforementioned attributes which defendants desire in the persons whom they employ as supervisors and technicians are important, if not absolutely necessary, qualifications, the court perceives no direct relationship between the possession of a high school diploma and the possession of any or all of these qualities. As with the tenth grade requirement, the defendants are simply employing too crude a standard in view of the all but undisputed adverse effect upon blacks.

COLLEGE DEGREE REQUIREMENT

Defendants presently require an applicant for the job of scheduling analyst, traffic analyst, or systems analyst possess a college degree; however, the degree need not be in any particular discipline or major.

Again, the 1970 Census Report for Mississippi demonstrates that this requirement has a substantial adverse impact on blacks. In Bolivar County in 1970, for example, 14.7% of the

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(footnote continued)

force to some extent—less than ten percent is black—by transferring black persons employed in other capacities into office and clerical jobs. Defendants have hired some black applicants with clerical qualifications, but have assigned them to work as operatives on the production line.

white males over 25 and 12.5% of the white females over 25 have college degrees, whereas only 3.2% of black males and 3.3% of black females of the same age have degrees. In Mississippi as a whole, 10% of the white persons in the state over 25 met this requirement while only 3.7% of the black people did.

The college degree requirements for traffic and systems analysts were not instituted until some time subsequently to July 15, 1968. The requirement has not been validated pursuant to EEOC guidelines.

Although no one is presently employed in the traffic and systems analyst jobs, defendants concede that no black has ever been employed in an analyst capacity at their Cleveland plant.

The defendants argue that the college degree requirement for the jobs in the analyst category is necessitated by the "professional demands" of the positions. In view of the disparate effect of the requirement and in the absence of more concrete evidence as to the need for the continued use of this qualification, the court has concluded that the college degree requirement for the jobs of scheduling, systems, and traffic analysts is unjustified and unlawful.

FAILURE TO POST OR ANNOUNCE VACANCIES IN JOBS ABOVE THE MATERIAL HANDLER AND ASSEMBLER LEVEL

Although the defendants ordinarily announce to assemblers and material handlers the existence of a vacancy in other assembler or material handler positions so that employees may make known their interest in these positions, it is not customary to announce or post information concerning vacancies in office or clerical jobs, technician jobs, or supervisory positions. Failure to post information concerning vacancies in the clerical, technician, and supervisory positions has resulted in the incumbents of those positions becoming the primary source of information concerning existing and/or expected vacancies. Since the supervisory, clerical, and technician work force, as

well as the management, at Travenol's Mississippi facility has been and remains overwhelmingly white, the exposure to job vacancy information is much greater among white employees than among black. Travenol's failure to post notice of vacancies impedes the access of the company's black employees to the better paying and more desirable jobs.

DISCRIMINATION IN PROMOTION

The most important criteria for promotion to jobs above the level of operative are an employee's length of service, possession of the requisite amount of education and the opinion of the employee held by his or her supervisor and certain officials of the personnel department. Because of past and present hiring discrimination against blacks, reliance on length of service in making promotions has a disproportionately adverse impact upon blacks' prospects of promotion. The racial make-up of the defendants' noncustodial work force, exclusive of the operatives, is reflected in the following statistics:

	May, 1964		March, 1966		March, 1968	
Job Level	No.	% White	No.	% White	No.	% White
Officials and Managers	13	100%	24	100%	49	100%
Professionals	0	—	18	100%	20	100%
Technicians	25	100%	27	100%	66	97.0%
Office and Clerical	24	100%	23	95.7%	33	97.0%
Craftsmen	46	100%	18	100%	32	100%

	Feb., 1969		March, 1970		March, 1971	
Job Level	No.	% White	No.	% White	No.	% White
Officials and Managers	52	100%	52	100%	48	100%
Professionals	31	96.8%	40	97.5%	47	97.9%
Technicians	51	98.0%	14	100%	12	100%
Office and Clerical	29	96.6%	33	97.0%	35	94.3%
Craftsmen	34	100%	68	98.5%	78	94.9%

Job Level	March, 1972		March, 1973		Feb., 1974	
	No.	% White	No.	% White	No.	% White
Officials and Managers	52	100%	47	97.9%	53	96.2%
Professionals	52	94.2%	40	92.5%	43	88.4%
Technicians	12	100%	16	100%	20	95.0%
Office and Clerical	38	94.7%	34	94.1%	38	92.1%
Craftsmen	79	93.7%	76	93.4%	94	86.2%

All in all, the court has concluded that the procedures for promotion which defendants employ tend to perpetuate the past discrimination suffered by blacks at defendants' Cleveland plant. All the criteria used in the promotion process, while racially neutral on their face, suffer from this failing. Reliance upon length of service must have some adverse effect upon blacks because of their prior exclusion from defendants' non-custodial work force. Use of the twelfth grade requirement has a clearly adverse effect upon blacks in and around Cleveland, Mississippi as was seen earlier. And dependence upon the recommendation of defendants' predominantly white supervisory force is a "ready mechanism" to further impede black access to the supervisory ranks. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 240-43 (5th Cir. 1974); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). The court is of the opinion that, at the minimum, defendants should be required to refrain from use of the twelfth-grade education requirement and to develop and utilize some objective criteria for selection of operatives to be promoted to supervisory positions which will be racially neutral both on their face and in effect. *Pettway, supra,* at 241.

The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well intentioned management attempting to deal with job applicants and employees, equally on a case by case, or individual basis; however, the employment policies which defendants adopted in apparent good faith have had the effect of substantially impeding the entry of blacks into the company's work force. The full extent of the cumulative effect of these policies is perhaps not yet appreciated by Travenol

management, but the statistics brought forth in this case cannot fail to convince an objective observer that employment opportunities at Travenol's Cleveland plant were certainly, and to some extent remain, far from equal at the times pertinent to this case.

While it is no doubt true that a great deal of the segregated nature of defendants' operation in Cleveland may be traced to the racial discrimination which has historically permeated American society in general, by passage and implementation of the Civil Rights Act of 1964, the Congress of the United States announced that the time has arrived to bring minorities into the work force of the nation's industries on an equal footing with persons of the majority race. As the Supreme Court has stated:

> The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668, 676 (1973).

On the record in this case, the court is constrained to hold that Travenol's employment practices, particularly prior to 1973, were not consistent with the requirements of Title VII and its underlying purposes and goals. Accordingly, it will be necessary for defendants to make some adjustments in their employment practices in order to comply with the law of the land.

SEX DISCRIMINATION

From February of 1965 until 1968, the master job order form used by the Cleveland office of the state employment services (MSES), specified "male" as a requirement for the material handler positions at the Travenol plant and "female" for the assembler positions. At some point during the summer of 1968, Travenol's personnel manager visited the Cleveland

office of MSES and requested elimination of the sex designations on the referral forms. However, sex identification of the assembler position was such in the minds of prospective job applicants that no male applied for an assembler position at defendants' plant until March 31, 1971. Likewise, no females applied for the material handler positions until November of 1971. Defendants did, however, in December 1970, provide female assemblers an opportunity to transfer to material handler positions. Two female assemblers accepted the invitation to transfer. Later, in 1971, a number of female assemblers became material handlers, but ultimately all chose to return to the assembler position.

By the fall of 1972, women made up 100 percent of the assembler work force, but only 2.6 percent of the material handler work force. As was mentioned earlier, assemblers are compensated at a substantially lower rate of pay than material handlers.[8]

One of the most arduous and physically demanding positions at defendants' plant is known as the "hooks" job. The hooks positions are occupied by material handlers whose chief job duty is to place empty bottles on and remove filed bottles from the production line. The hooks positions are found only in the solution filling and solution packing departments of the plant. Of the approximately two hundred material handlers employed at defendants' Cleveland plant, about half are assigned to the filling and packing departments. Approximately half the material handlers in these departments—forty to fifty individuals—are assigned to the hooks jobs.

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[8] Historically, the assembler pay rate has been closely related to that of the custodial or janitorial staff. In 1965, assemblers were paid four cents per hour more than custodians while material handlers were paid twenty-seven cents per hour more than assemblers. Since 1965, the assembler pay rate has remained tied to that of the custodial work force while the gap between the material handler and assembler pay rates has widened considerably. In 1974, assemblers were paid only three cents per hour more than custodians but material handlers were paid forty-six cents per hour more than assemblers.

As of July 5, 1974, the starting pay rate for material handlers was $3.11 per hour, for assemblers $2.65, and for custodial employees $2.62 per hour.

Although there was no policy concerning assignments to the hooks positions prior to 1966, at some point subsequent to that time a practice was established whereby those material handlers performing the hooks job would have the first option—the right of first refusal—at any vacancies which might develop in the other material handler positions within the filling and packing departments. As might be imagined, this policy became necessary because the physical exertion inherent in the hooks positions caused them to be regarded among the employees as somewhat less desirable than the other material handler jobs.

When a vacancy develops in a material handler's job, defendants ordinarily announce its existence to all persons then working as assemblers or material handlers. Each material handler interested in a lateral transfer and each assembler interested in upgrading to a material handlers job may request a transfer and/or promotion. However, material handlers in the hooks positions are given first refusal on the vacancy. Hooks workers very rarely decline offers to transfer to non-hooks positions. This right of first refusal has the effect of transforming any material handler vacancy into a vacancy on the hooks jobs.

Placing the matter in context and considering all the evidence offered at trial the court, as fact finder, has concluded that the defendants, intentionally or otherwise, have structured the material handler jobs at their Cleveland plant so that while the vast majority of them require little heavy lifting, there are a few positions—particularly the hooks jobs—which required a great deal of heavy lifting. The prospect of facing the requirements of the duties of a hooks worker has been an almost foolproof method of blocking the entry of females into the material handler work force. Of the thirteen females initially assigned as material handlers who quit their jobs because of physical inability to perform, eleven—or 84.5%—were assigned to the hooks positions. Among the forty-four females assemblers who declined promotion to material handler between August, 1971 and April, 1973, thirty-nine—or 88.6%—turned

down the promotions because they would have found themselves assigned to the hooks positions in the solution filling or solution packing departments.

Although Travenol's management was and is aware that the spectre of the hooks position is effectively preventing entry of women into defendants' material handler work force, there has been no attempt to devise alternative methods of staffing the hooks positions. Because of the devastating impact of the hooks requirement on the movement of females into the material handler work force, Travenol must make at least some attempt to accommodate its employment practices with the goals and requirements of Title VII, EEOC Decision No. 71-1868, April 22, 1971, ¶ 6266, CCH EEOC Decisions (1973); EEOC Decision No. 72-0561, December 20, 1971, ¶ 6308, CCH EEOC Decisions (1973).

SEX DISCRIMINATION RELATIVE TO PREGNANCY

Until 1972, defendants required pregnant employees to take a mandatory six month maternity leave without pay. The leave was required to begin three months prior to the expected date of delivery and to continue until three months after delivery. In May 1972, Travenol instituted a new policy allowing a pregnant employee to continue work prior to delivery so long as her doctor considered it advisable. The policy currently in effect also allows a new mother to return to work following delivery whenever the attending physician advises that a resumption of employment would present no health problems. Under the present policy, maternity leave is still without pay.[9]

In contrast to their forced leave policy regarding pregnancy, the defendants have never required employees suffering from any other sort of medical problem or disability to take leave, particularly leave without pay, for a predetermined period of time.

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[9] The company policy in this regard is set forth in the following language:

"Maternity leaves of absence will be unpaid until such time as it is definitely determined that applicable law requires otherwise."

Travenol maintains a salary continuation plan for the employees at its Cleveland plant which provides for payments at varying rates for certain categories for employees in the event of a disability precluding gainful employment. Although the plan provides for wage continuation during period of temporary disability due to other non-occupational causes, it does not provide payments for temporary pregnancy-related disabilities or for inability to work due to the pregnancy itself. However, the plan does provide for payments for disabilities caused by male gender-linked conditions, such as circumcision and hemophilia, and some disabilities more common among males, such as gout and prostatectomy.

Defendants argue that including payment for temporary pregnancy-related disabilities within the coverage of the salary continuation plan would substantially increase the costs of the plan and result in fewer benefits for all employees. The EEOC regulations on this point, which are entitled to "great deference", appear to counter defendants' argument neatly.

> It shall not be a defense under title VII to a charge of sex discrimination in [fringe] benefits that the cost of such benefits is greater with respect to one sex than the other. 29 C.F.R. § 1604.9.

Although there has as yet been no ruling by the Supreme Court on the question of whether the exclusion of pregnancy-related disabilities from fringe benefit programs—such as an income protection plan—maintained by an employer transgresses the terms of Title VII, the Court addressed a related, albeit distinguishable, issue in *Geduldig v. Aiello,* 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974). In *Aiello,* the court held that the State of California did not violate the Equal Protection Clause of the Fourteenth Amendment by failing to include disabilities relating to normal pregnancy under the coverage of its statewide and completely employee funded disability insurance program.

Although defendants argue that *Aiello* is dispositive of the pregnancy disability issues here, the court is more inclined to agree with the analysis of *Aiello* contained in *Wetzel v. Liberty Mut. Ins. Co.,* 511 F.2d 199 (3rd Cir. 1975), cert. granted, 421

U.S. 987, 95 S.Ct. 1989, 44 L.Ed.2d 476,[10] if for no other reason but that in *Aiello* the standard against which defendants' conduct was measured was a constitutional one whereas here it is statutory (Title VII). Two other appellate courts have similarly interpreted *Aiello*. *Communications Workers v. American Tel. and Tel. Co.*, 513 F.2d 1024, 1030-31 (2nd Cir. 1975); *Gilbert v. General Elec. Co.*, 519 F.2d 661, 665-67 (4th Cir. 1975). Accordingly, the court is of the opinion that, in order to comply with Title VII, Travenol must extend full and equal coverage of all its fringe benefit programs to women. Particularly, the disability leave and salary continuation programs must be altered so as to discontinue disparate treatment of pregnant employees, pregnancy, and pregnancy-related disabilities.

SENIORITY RIGHTS

Having found defendants' hiring and promotion policies violative of Title VII as to both blacks and females, the court must finally address the legality of the procedure employed at the Cleveland plant to determine which employees will be affected in the event of a lay-off or other reduction in the work force.

So far as the evidence shows, Travenol's Cleveland plant never experienced a lay-off until 1972. As a matter of fact, prior to 1972 the defendants had not even formulated a plan or procedure for use in the event of a lay-off. Not surprisingly, the lay-off policy adopted in 1972 was the customary "last hired/first fired" standard.

The 1972 lay-off at the Cleveland plant had a disproportionately adverse effect upon black females. At the time of the lay-off, there were 1068 persons employed as operatives at Travenol's Cleveland plant. A total of 225 persons were laid-off in the course of the reduction in work force. Of the 306

[10] Although the Supreme Court's ultimate disposition of *Wetzel* would be of great benefit in determining the issues in this case relating to pregnancy, the court does not feel justified in delaying decision on the point pending the outcome of *Wetzel*.

males employed as operatives at the time, 56, or only 15% of the male work force, were detrimentally affected by the lay-off. Of the 566 white female operatives employed at the time, 87, or only 15.4% of the white female operative work force, were laid-off in the course of the reduction in employees. But of the 196 black females employed as operatives at the time of the lay-off, 41.8%, or 82 black women, were adversely affected.

It appears that the law concerning lay-offs which disproportionately affect females and minorities is in an even more unsettled state than that concerning pregnancy disabilities, if such is possible. Of course, the court has not been left completely adrift for, as the Fifth Circuit has said, in an employment discrimination case, it is the duty of the district court in the exercise of its discretion, "to carry out within practicable limits the purpose of Title VII, which is to make the discriminatee whole and to remedy the effects of past discrimination." *Franks v. Bowman Trans. Co.*, 495 F.2d 398, 414 (5th Cir. 1974), cert. granted, 420 U.S. 989, 95 S.Ct. 1421, 43 L.Ed.2d 669 (1975). In the context of considering the legality of a seniority system of an employer which has been found, at some point in the past, to have engaged in unlawful employment practices, the difficulty arises in determining whether the employees now seeking relief from operation of the seniority plan are, in fact, discriminatees under Title VII.

In this circuit, this issue was most recently addressed in *Watkins v. United Steel Workers*, 516 F.2d 41 (5th Cir. 1975). In *Watkins*, the court refused to disturb the operation of a last hired/first fired lay-off plan, meticulously couching its holding in the following language:

> We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or § 1981 [of Title 42 of the U.S. Code], even though the use of the seniority system results in the discharge

> of more blacks than whites to the point of eliminating blacks for the work force, where the individual employees who suffer lay-off under the system have not themselves been the subject of prior employment discrimination. 516 F.2d at 44-45.

The holding in *Watkins* is inapplicable to the instant case for many reasons; however, it does point out the various factors which must be considered when determining whether a seniority system somehow fails to comply with Title VII. In the case at bar, the court has found that the employer has a recent history of employment discrimination in the hiring process as to both race (education requirements) and sex (exclusion of females from the material handler work force). In fact, the court has determined that the employer here is presently engaging in some unlawful employment practices as to both females and blacks. Here, in contrast to *Watkins*, the seniority system employed in the event of layoff is of recent origins, having been initially instituted in 1972. Further, it is clear that some of the employees who would be and were affected in the event of a lay-off have themselves been the victims of prior discrimination in hiring practices. For example, it appears likely that, absent the tenth-grade education requirement which the court has found unlawful under Title VII, Ms. Cherry's plant-wide seniority would date from 1970, and that of Ms. Griffin from 1966.

Pending the decision of the Supreme Court in *Franks, supra*, it is apparently the law in this circuit that only those black and/or female employees who have been prevented from attaining their "rightful place" of employment *as individuals* by their employer's unlawful practices are entitled to any relief from a last hired/first fired lay-off system.[11] In other words, only those members of the plaintiff class in this case who can show that, but for Travenol's unlawful discrimination, they would have acquired such seniority rights as to afford them to some degree of insulation from the adverse effects of a lay-off

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[11] Apparently such is also the law in the Second Circuit. See *Chance v. Board of Examiners*, 534 F.2d 993 (2nd Cir. 1976), 44 U.S.L.W. 2343 (Jan. 19, 1976).

are entitled to any relief from the across-the-board operation of the seniority system. Because such a determination may require a case-by-case examination as to the factual situation of each member of the class, it is impossible for the court to frame any sort of relief at this juncture, having thus far inquired into the merits of the case as to the existence of unlawful discriminatory practices only. However, it is clear at this point that some modification of the last hired/first fired lay-off policy will be required in order to afford the black victims of the tenth and twelfth grade requirements and the female victims of the job assignment discrimination their rightful places within the structure of the seniority system.

CONCLUSION

By way of summary, the court has determined that, for the reasons set forth in this opinion, an injunction should be issued prohibiting defendants from requiring a tenth grade education (or GED equivalency) of applicants for operative positions; barring defendants from requiring a twelfth grade education (or GED equivalency) of applicants for office and clerical jobs, technician jobs, and supervisory positions; and enjoining Travenol from requiring a college degree as a qualification for the jobs of systems, traffic, or scheduling analyst. The court will also enter an order directing defendants to include pregnancy and pregnancy-related disabilities under the coverage provided in the salary continuation plan currently in effect on the same basis as all other disabilities. However, either because the record has not yet been sufficiently developed or because the court does not intend to undertake to assume the management of defendants' plant on a day-to-day basis, the court is not presently in a position to rule on the backpay question, the specific alterations to the defendants' seniority system which are necessary to afford certain employees their "rightful places", or the question of modification of the manner in which employees are assigned to the hooks positions in the solution packing and filling departments. On these issues, the court has determined to require the parties to submit suggestions and proposals as to how the court should approach disposition of these questions. An order will be entered accordingly.

United States Court of Appeals,
FIFTH CIRCUIT

No. 76-1801.

WILLIE MAE PAYNE, *et al.*,
Plaintiffs-Appellees,

v.

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,
Defendants-Appellants.

As Amended on Denial of Rehearing
and Rehearing En Banc
March 23, 1978.

Before THORNBERRY, AINSWORTH and RONEY, *Circuit Judges.*

RONEY, *Circuit Judge:*

This Title VII class action appeal involves four disputed paragraphs of an injunction. The first paragraph, being a general injunction against employment discrimination on the basis of "color, race or sex," violates Fed.R.Civ.P. 65(d), which requires specificity and detail in injunctive orders. It must be set aside. The next three paragraphs involve educational employment requirements of tenth grade, twelfth grade, and college degree for various jobs, which requirements are alleged to discriminate against prospective black employees. Because plaintiffs lack standing to contest the tenth grade requirement, the injunctive relief ordered in respect to that education requirement is set aside. The relief ordered as to the twelfth grade and college degree requirements is supported by the record, and is affirmed. Both parties agree that a fifth paragraph relating to

coverage for pregnancy and related disabilities must be vacated in light of *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Because the district court's opinion has been published, it is unnecessary to relate again all of the details of this lawsuit. *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. 248 (N.D.Miss.1976).

General "Obey the Law" Injunction

Plaintiffs contend that a general injunction in this case should be permitted because the defendants' discrimination at the Cleveland, Mississippi, pharmaceutical manufacturing plant has been long, varied, and imaginative. Specific relief can be structured for the named plaintiffs, however, and the general relief in favor of a class of "all present, past and future black female employees and applicants at the Cleveland plant" carries the order beyond that permitted by the rules.

The paragraph enjoined defendants from discriminating on the basis of color, race, or sex in employment practices, prohibiting defendants from:

> (1) Discriminating on the basis of color, race, or sex in employment practices or conditions of employment in defendants' Cleveland, Mississippi facility, against the named plaintiffs in the above captioned action or either of them, or any member of the class which they represent, as such class is defined in the court's memorandum of opinion this day released in said action.

This paragraph clearly fails to satisfy the requirement that an injunction "be specific in terms" and "describe in reasonable detail ... the act or acts sought to be restrained ...." Fed.R.Civ.P. 65(d). This command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 438-39, 96 S.Ct. 2697, 2706, 49 L.Ed.2d 599 (1976). The word "discriminating," like the word "monopolizing" in *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 125-26, 68 S.Ct. 947, 92 L.Ed.

1245 (1948), is too general. The provision is more specific than Title VII itself only in that it does not prohibit employment discrimination based on religion and natural origin. *See* 42 U.S.C.A. § 2000e-2. Such "obey the law" injunctions cannot be sustained. *See, e. g., NLRB v. Express Publishing Co.*, 312 U.S. 426, 435-36, 61 S.Ct. 693, 85 L.Ed. 930 (1941); *Russell C. House Transfer & Storage Co. v. United States*, 189 F.2d 349, 351 (5th Cir. 1951).

Tenth Grade Requirement: Standing

The second paragraph prohibited defendants from:

> (2) Requiring a tenth grade education (or its equivalency on a General Education Development [GED] test) of applicants for employment for operative positions in defendants' said facility.

Defendants attack this part of the injunction on the ground that the three named plaintiffs lack standing to question the legality of the tenth grade requirement. At the time crucial to the issue of standing, when the complaint was filed, all three of the named plaintiffs satisfied the tenth grade education requirement. Indeed, the trial court found that each of the named plaintiffs had fulfilled the requirement prior to submitting applications at the Cleveland plant. *Payne v. Travenol Laboratories, Inc., supra*, 416 F.Supp. at 251, 252. Thus plaintiffs can hardly argue that their rejections resulted from the imposition of a discriminatory education standard.

To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or that prospective relief will remove the harm. *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). As this Court recently noted in *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976):

> The fact that some members of the class may have had standing to raise this claim is irrelevant. . . . [T]he necessary requirement is for a *named* plaintiff to have standing at the time the litigation is filed. We are unaware of any case where any federal court has

> reached a substantive issue absent a named plaintiff who had standing at the time the action was filed.

Id. at 1269-70 (emphasis in original). Here, none of the named plaintiffs nor any member of the class had standing to challenge the tenth grade education requirement. From the class of "all past, present and future black female employees and applicants" the district judge excluded "all black female applicants who lack a tenth grade education or equivalency." Thus, unlike the situation presented by broadly defined Title VII classes without defined exclusions, no member of the class could claim to be aggrieved by the education requirement.

Citing *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968), plaintiffs argue that a named plaintiff should not be forced to remain unqualified for potential employment during the lengthy pendency of litigation challenging the employment criteria causing his disqualification. In *Jenkins,* we held that the named plaintiff's acceptance of a promotion, subsequent to the filing of a complaint alleging racial discrimination in the company's promotional system, moots neither the individual claim nor that of the class. If an employer could negate an employee's standing to challenge discriminatory employment practices by the simple expendient of offering him unilaterally the relief he seeks for the class, the individual-initiated enforcement structure of Title VII would be seriously jeopardized. *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976). The principle, however, does not apply to the instant facts. Plaintiffs, due to no act of Travenol, possessed tenth grade educations and therefore lacked standing at the time suit was filed.

This case must be distinguished from those in which the named plaintiffs may have little qualifications for a particular job, without regard to the disqualifying requirement they attack, such as the analyst jobs discussed in the portion of this opinion dealing with Travenol's college degree requirements. Here the named plaintiffs and each member of the class were qualified on the precise requirement which they seek to set aside.

Plaintiffs also attempt to establish standing by noting that during at least 80 of the 90 days preceding the January 29, 1970, filing of plaintiff Willie Mae Payne's first EEOC charge, she failed to satisfy the tenth grade education requirement. No evidence appears in the record to suggest that Ms. Payne applied for employment during this 80-day period. Plaintiffs argue that the question whether Ms. Payne applied is irrelevant in light of the recent Supreme Court case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which holds that seniority relief should not be denied to a class member who did not apply for a job when applying would be futile because of the employer's discriminatory practices. In this case, however, the trial court's definition of the class removed from consideration all applications for employment submitted to Travenol prior to March 3, 1970, so that the situation prior thereto is irrelevant on this appeal.

Because we hold that plaintiffs lacked standing to challenge the tenth grade education requirement, we do not address Travenol's alternative contentions, first, that plaintiffs failed to prove the requirement had a disparate impact on blacks and, second, that the requirement was justified by business necessity.

Twelfth Grade Requirement

The third injunctive paragraph enjoins defendants from:

> (3) Requiring a twelfth grade education (or its GED equivalency) as a condition of employment in office, clerical, technician and supervisory positions in defendants' said facility.

In respect to his provision, defendants contend that the court measured the degree of disparate impact by an incorrect statistical referent. Travenol, citing *Robinson v. City of Dallas*, 514 F.2d 1271 (5th Cir. 1975), argues that the trial judge should have drawn his statistics from Travenol's operative work force rather than the general population because most of the positions requiring twelfth grade educations are filled through the promotion of assemblers and material handlers. The

evidence in this case, however, shows that although a large majority of the employees occupying positions subject to the twelfth grade requirement were promoted from operative jobs, a not insignificant number were hired from the general population. The trial court's consideration of general population data was therefore not improper. Evidence in the record amply supports the trial court's findings of disparate impact and lack of business necessity. The third paragraph of the injunction is therefore affirmed.

College Degree Requirement

The fourth injunctive paragraph enjoins defendants from:

> (4) Requiring a college degree as a qualification for the positions of systems, traffic, or scheduling analyst, in defendants' said facility.

Travenol challenges this part of the injunction on two grounds. First, it maintains that plaintiffs failed to prove the discriminatory impact of the college degree requirement. Travenol employed only five analysts subject to the college degree requirement and urges that positions having so few incumbents cannot properly be subject to statistical proofs of disparate impact. The proper focus when determining the disparate impact of an employment condition is on those excluded by the requirement, not on the number of positions to be filled as Travenol suggests. *See Green v. Missouri Pacific Railroad,* 523 F.2d 1290, 1294 (8th Cir. 1975). The record contains ample evidence that the college degree requirement, not adopted until 1968, rendered "ineligible [for employment] a markedly disproportionate number of Negroes . . . ." *Griggs v. Duke Power Co.,* 401 U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971). The defendants failed to prove that the requirement was justified by business necessity.

Second, Travenol maintains that plaintiffs' class action cannot properly extend to the employment practices applicable to analyst positions. In short, Travenol argues that the level of capability required for these positions is such that, even absent the college degree requirement, plaintiffs would never be

serious candidates for them. Even assuming that the named plaintiffs were not strictly affected by the college education requirement, this Court's policy regarding class actions in employment discrimination cases dictates that plaintiffs could properly challenge Travenol's college degree requirement. Plaintiffs' action is an "across the board" attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of those discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies. *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975); *see Long v. Sapp*, 502 F.2d 34 (5th Cir. 1974); *Jack v. American Linen Supply Co.*, 498 F.2d 122 (5th Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

The injunction entered by the district court is reversed as to paragraphs (1) and (2) and the fifth unnumbered paragraph relating to pregnancy disabilities, and said paragraphs are hereby vacated and deleted. The injunction is affirmed as to paragraphs (3) and (4). Each party will bear his own costs in connection with this appeal.

REVERSED AND VACATED IN PART AFFIRMED IN PART.

United States District Court,
N. D. MISSISSIPPI,
DELTA DIVISION

No. DC 72-13-S-P

WILLIE MAE PAYNE, *et al.*,
Plaintiffs,

v.

TRAVENOL LABORATORIES, INC., *et al.*,
Defendants.

ORDER

Upon due consideration of the Report and Recommendation of the United States Magistrate entered herein on July 24, 1980, and the objections of the parties thereto, the court finds that said objections are not well taken, and it is accordingly

ORDERED:

That the Report and Recommendation of the United States Magistrate is hereby adopted as the opinion of the court.

This, 18th day of August, 1980.

/s/ ORMA R. SMITH
Senior Judge
United States District Court

United States District Court,
N. D. Mississippi,
Delta Division

No. DC 72-13-S-P

Willie Mae Payne, *et al.*,
Plaintiffs,

v.

Travenol Laboratories, Inc., *et al.*,
Defendants.

DECREE

This action was tried before the court on March 3-14, 1975. Findings of Fact and Conclusions of Law were entered on February 19, 1976, and an injunction against some of the practices found to be discriminatory was also entered on that date. The defendants thereafter took an appeal from the entry of the injunction, and the injunction was affirmed in part and reversed in part. Report and Recommendation of the United States Magistrate having been filed pursuant to the order of reference entered on January 24, 1979, and having this date been adopted by the court as its opinion, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. The court will retain jurisdiction over this case for two years from this date, provided that all litigation concerning back pay to class members has been concluded by such time. Reporting requirements shall terminate upon the expiration of this court's retention of jurisdiction.

2. The defendants shall continue to obey the provisions of paragraphs 3 and 4 of the injunction entered herein on February 19, 1976.

3. The defendants shall not permit their personnel or supervisory officials to engage in subjective discrimination on the basis of race, and shall not permit such officials to engage in subjective discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., or of 42 U.S.C. § 1981, in hiring and promotion decisions.

4. During the period of retention of jurisdiction, the defendants shall not impose any new, facially-neutral selection criteria for hiring, transfer, or promotion unless such are adopted in accordance with the provisions of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 et seq.

5. The defendants shall not require any applicant or employee to have a 12th-grade education or 12th-grade G.E.D. equivalency certificate as a condition of employment in an Apprentice Mechanic position.

6. The defendants shall inform the Mississippi State Employment Service of all vacancies to be filled by hire, in jobs above the level of Material Handler and of Assembler, so that information as to these vacancies may be spread more widely among blacks and women.

7. The defendants shall post notices, at every place at which they take applications for employment, stating the name, shift and pay rate of every job category in which there is a vacancy to be filled by hire. In the case of Material Handler jobs, the type of job which is vacant, and the extent of the physical effort required by that job, shall be stated. Applicants shall be allowed to examine the defendant's position descriptions for any position which is then being posted as available to be filled by hire, and shall be informed of this right.

8.(a) Within 60 days from the entry of this Decree, the defendants shall write to all unhired applicant members of the plaintiff class of whom they have knowledge who applied for employment prior to February 19, 1976, inviting them to reapply if they are still interested in employment with the defendants. Such class members responding to this notice shall be given priority in hiring over other applicants, as long as they

keep their applicants active, (1) until they have been disqualified, for every position customarily filled by hire, according to objective, job-related criteria, (2) until they have been hired in a noncustodial job category, or (3) until they have rejected an offer of employment in a noncustodial job category. The defendants shall keep a record of all reponses to this invitation, and of their actions thereon.

(b) Plaintiff Griffin shall be given first priority for consideration for employment under the provisions of sub-paragraph (a).

(c) Such unhired applicants and present or former employee class members, whose prior application forms indicate either clerical skills or interest in clerical work shall be informed, as part of the notice described in sub-paragraph (a), of the right to reapply for clerical jobs. The reapplicants responding to this notice shall be given priority in hiring for clerical jobs over other applicants for such jobs, as long as they keep their applications active, (1) until they have been disqualified for every clerical job category customarily filled by hire or by promotion of hourly-rated employees, according to objective, job-related criteria, (2) until they have been hired or promoted into such a clerical job category, or (3) until they have rejected an offer of employment or of promotion into such a clerical job category. The defendants shall keep a record of all responses to this invitation, and of its actions thereon.

9. (a) The defendants shall continue to use the job posting procedure for hourly jobs which became effective on April 1, 1980, other than the six-month waiting period for eligibility for promotions contained in part 4.05.2 of the procedure, use of which shall be terminated. This provision shall not be construed so as to prevent the defendants from disqualifying any employee from consideration for upgrade or transfer on the basis of objective, job-related criteria. During the posting period, employees shall be allowed to examine the defendants' position description for the positions which are posted. The posting shall inform them of this right.

(b) The defendants shall use the job posting procedure described in sub-paragraph (a), as modified therein, for salaried job categories which have traditionally been filled by persons hired locally, as well as for hourly job categories.

(c) The defendants shall not give present or former Material Handlers any advantage over other employees in filling Group Leader or other supervisory positions.

10. (a) Individual notice in form approved by the court shall be mailed by defendants to each class member laid off from hourly employment and not recalled, and provided to each class member presently employed in an hourly position, who applied for employment prior to February 19, 1976 and was not hired by that date, advising of such class members' possible entitlement to constructive seniority, and providing opportunity to claim such. The notice shall state that failure to claim constructive seniority shall constitute a waiver of such.

(b) Counsel for plaintiffs shall direct the compliance of constructive seniority list of all class members affirmatively responding to the notices provided in accordance with paragraphs 8.(a) and 10.(a), and shall state for each such class member her name, date of hire, if applicable, and date of first recorded application for employment with the defendants. In order to compile the constructive seniority list, plaintiffs' counsel and persons under their supervision shall be given access to all application forms for hourly employment for the years 1970-1975, and a list of names and dates of hire of hourly workers for such years. Each such class member's presumptive constructive seniority date shall be computed by determining the average waiting period before hire for white applicants during her application year and adjusting her hire date by the difference between such waiting period before hire and her actual waiting period before hire, if greater. The defendants may for any reason, they deem sufficient contest this presumption. If they do so, they shall provide a short, plain statement of their reasons for contending that the employee would not have been

hired then and would have been hired later, absent discrimination, and of the facts supporting such reasons. The defendants shall state therein their proposed alternative constructive seniority date and the reasons and facts supporting such a date. Copies of the list and of the defendants' statement shall be filed with the clerk and served on opposing counsel.

(c) Counsel shall confer and attempt to agree on the wording of a notice, and of the form to be enclosed therewith, to be given to all class members presently employed and included on the constructive seniority list, and to all class members laid off and not recalled and included on the constructive seniority list, and given upon completion of their probationary period to all class members hired in the future and included on the constructive seniority list. Failing agreement of counsel, each party shall then submit a proposed letter and the court shall then decide upon its final form. The notice shall explain the purposes of a constructive seniority date, shall state the date of her first recorded application for employment with the defendants, shall state her constructive seniority date and the method of its calculation by plaintiffs, shall inform the employee of any contest by the defendants to her presumptive constructive seniority date and of its factual basis, shall briefly advise the employee of the benefit of a presumption in proving a claim, and shall advise the employee of her options which can be exercised by filling out the form enclosed therewith and sending it to counsel for plaintiffs within 30 days after provision of the notice to the class member. The options are:

(1) to assert her right to the presumptive constructive seniority date as calculated;

(2) to seek an earlier constructive seniority date; or

(3) to accept the defendants' proposed alternative constructive seniority date, if any.

The notice shall state that counsel for plaintiffs shall be available to answer inquiries at designated times and places. If

the employee rejects the defendants' proposed date, the form shall request that she set forth any facts she may have available in response to the defendants' factual contentions. Copies of the forms reviewed by counsel for plaintiffs shall be provided to the defendants.

(d) Counsel for plaintiffs shall seek to obtain as many agreements as possible as to constructive seniority dates, but shall not have the right to compromise, without specific consent, the constructive seniority date of any class member who has submitted the above-described form.

(e) Any remaining disputes as to each employee's constructive seniority date shall be resolved by the court.

(f) Constructive seniority shall be used for all purposes for which seniority is now used or may hereafter be used, including all competitive uses of seniority and all uses of seniority to determine entitlements to benefits.

11. Any class member who is entitled to constructive seniority under the provisions of paragraph 10 as result of discriminatory delay in her hire, and who has been laid off and not been recalled as of the effective date of this Decree, shall be recalled in accordance with her constructive seniority date and the plant or constructive seniority dates of the other employees laid off. The employees whose seniority is to be compared are the employees in competition for recall with the class members in question.

12. The defendants shall designate an official who will have responsibility for securing compliance with this Decree, and such designated official shall review or supervise the processing of employment forms and applications.

13. The defendants shall post copies of this Decree in conspicuous locations throughout their plant.

14. Within 15 days after the end of each calendar quarter, the defendants shall file with the court a list of all persons promoted from one job category to another within the previous calendar quarter, including the name, race, sex, and old and new job titles and pay rates of each such employee. With this list, they shall also file a list of all initial assignments in the

calendar quarter, including the name, race, sex, job title and pay rate of each person initially assigned. Once each year following the entry of this Decree, the defendants shall file with the court a statement of the steps they have taken to comply with each of its provisions. Copies of such documents shall be served upon counsel for plaintiffs.

15. The provisions of this Decree apply only to the defendants' facility at Cleveland, Mississippi.

This, the 18th day of August, 1980.

/s/ ORMA R. SMITH

Orma R. Smith, Senior Judge
United States District Court

United States Court of Appeals,
FIFTH CIRCUIT

No. 80-3764

WILLIE MAE PAYNE, *et al.*,
Plaintiffs-Appellees
Cross-Appellants,

v.

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,
Defendants-Appellants
Cross-Appellees.

April 22, 1982.

Before CLARK, *Chief Judge,* GOLDBERG and WILLIAMS, *Circuit Judges.*

JERRE S. WILLIAMS, *Circuit Judge:*

For the second time, we are asked to resolve some of the issues arising in this protracted employment discrimination class action between Willie Mae Payne and Travenol Laboratories, Inc. The district court issued a decree on August 18, 1980. The decree, while leaving unfinished the back pay segment of this case, largely concludes the formulation of injunctive relief. Both parties have appealed urging numerous errors, major and minor.[1] Having journeyed deep into the record of this case to assess the merits of both parties' objections, we conclude that the bulk of the decree of the district court should be affirmed. We disagree with certain aspects of the decree, however, and therefore remand the case for further proceedings.

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[1] In this opinion we shall refer to Payne as the plaintiff or the appellant, and to Travenol as the defendant or the appellee.

I. BACKGROUND

Nearly a decade old at the time of this appeal, this case began on March 2, 1972 when Willie Mae Payne, a black female, and several other named plaintiffs obtained right-to-sue letters and filed suit under Title VII, 42 U.S.C. § 2000e *et seq.* and also filed claims under 42 U.S.C. § 1981 against Travenol Laboratories. Payne attacked a battery of Travenol's employment practices at its Cleveland, Mississippi, pharmaceutical plant as being racially discriminatory. The complaint was later amended to include charges of sex discrimination as well.

Travenol, the largest employer in Cleveland, Mississippi, manufactures and packages drugs, particularly intravenous solutions, for distribution to medical facilities. The solutions are packaged on an assembly line by employees called "operatives". Two types of employees work on the assembly line: assemblers, who fill, cap, and inspect the bottles, and material handlers, who orchestrate and guide the flow of materials through the assembly process. Material handlers are compensated considerably better than assemblers, whose hourly pay is only slightly above the janitorial or custodial staff. The assembler and material handler positions require no special skills or experience.

Travenol employed no blacks at its plant until prodded by the affirmative action office of the Navy in 1964 or 1965. At that point, Travenol began to hire blacks. Simultaneously, Travenol required all applicants to be screened and referred by the Mississippi State Employment Service (MSES) and imposed a requirement that all applicants have a tenth-grade education or General Equivalency Diploma. Travenol then interviewed referred candidates and hired upon subjective appraisals of their alertness, comprehension, and cleanliness. Until 1968, Travenol had MSES refer only males for the material handler position and females for the assembler position. Travenol discontinued its reliance on MSES in 1971, but retained the tenth-grade requirement. Travenol also employs clerks, technicians, and managers. These positions have been filled both by promotions and by outside hiring. Travenol required a twelfth-grade education or General Equivalency

Diploma for some of these positions and a college degree for others. Travenol's staff above the operative level was almost exclusively white until 1974.

In 1975 the case was tried on the issue of liability, Payne representing a class of black females. The district court rendered its decision in 1976, finding that Travenol had discriminated on the basis of race and sex.[2] The court enjoined certain employment practices and directed the parties to submit suggestions on further relief, including constructive seniority and backpay.

On appeal, we vacated two aspects of the injunction and affirmed two others.[3] First, we held that the district court's blanket injunction against Travenol not to discriminate on the basis of race or gender in its employment practices was not specific enough to satisfy Federal Rule of Civil Procedure 65(d). Second, we held that no named plaintiff had standing to challenge Travenol's requirement of a tenth grade education for its entry-level assembly-line positions and vacated the district court's conclusion that the tenth-grade requirement violated Title VII. Third, we affirmed the district court's injunction against Travenol's use of a twelfth-grade requirement for certain positions above entry-level. Fourth, we affirmed the injunction against Travenol's college degree requirement for other, higher-level positions.[4]

After our decision in *Payne I*, the district court directed that a magistrate hear the parties' suggestions for further relief and devise a recommended order. After ruling on numerous discovery skirmishes, the magistrate prepared a report and

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[2] The district court's opinion on Travenol's liability is reported in *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. 248 (N.D.Miss.1976), affirmed in part and reversed and vacated in part, 565 F.2d 895 (5th Cir. 1978), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978).

[3] 565 F.2d 895 (5th Cir. 1978), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978).

[4] Both parties agreed that a paragraph of the injunction concerning disability coverage for pregnancy had to be vacated in the light of *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). *See Payne* I, 565 F.2d at 897.

proposed decree which the district court adopted in full. The decreee is interlocutory in that it does not provide for a back-pay award.

The decree is tailored to provide injunctive relief for the discrimination that the district court had found in its 1976 decision, taking into account our decision in 1978 and hearings held before the magistrate in 1980. Paragraph one provides that the district court will retain jurisdiction for two years to supervise the decree, provided that back-pay litigation is concluded by that date. Paragraph two reaffirms the district court's earlier grant of injunctive relief against Travenol's use of twelfth-grade and college-degree requirements for certain positions above entry level. Paragraph three prohibits Travenol from discriminating subjectively on the basis of race or sex in violation of Title VII or § 1981 in its hiring and promotions decisions.

Paragraphs four, five, six, seven, and nine spell out more specific actions that Travenol must take to remedy its discriminatory hiring and promotion practices. Paragraph four, for example, prohibits Travenol from establishing new facially-neutral job prerequisites except in accord with guidelines promulgated by the Equal Employment Opportunity Commission. Paragraph seven requires Travenol to post notice of job vacancies, with details about salary, shift, and other matters.

Paragraph eight provides that Travenol must write to all unhired applicant class members who had applied by February 19, 1976, and invite them to reapply for work at Travenol. Those class members who respond are to be given priority over other applicants until they have refused an offer, accepted an offer, or been rejected on legitimate grounds. Travenol is also required to sort out those applicants who were qualified for clerical work and who indicated an interest in it, and invite them to apply for clerical jobs, giving them priority over other applicants.

Paragraph ten provides for granting constructive seniority to applicant class members who were rejected for discriminatory reasons, and employee class members whose date of hire was delayed by discrimination. Paragraph eleven

provides for the use of an employee class member's constructive seniority date in recalling employees from layoff. The remaining paragraphs provide the details for administering the decree.

Both parties object to portions of the decree. First, Payne argues that the decree denies her relief because the district court erroneously excluded black males from the class she represents and also because it erroneously established March 3, 1970 as the opening date of the class. She requests that we include black males in the class and move the opening date of the class back to the period of limitations for Title VII and for § 1981. Second, Travenol argues that the plaintiffs failed to prove discrimination in hiring or promotions, and asks us to reverse any relief in the decree on these issues. Payne argues that she proved discrimination in areas in which the district court erroneously denied her relief, and asks us to broaden the decree accordingly. Third, both parties lodge various objections to the form of the decree. Travenol claims that the decree affords too much relief, if discrimination was properly found. Payne argues that the decree affords too little relief. Our appellate jurisdiction to review this interlocutory decree rests on 28 U.S.C. § 1292(a)(1). We address each issue in turn.

II. LIMITATIONS ON THE CLASS CERTIFIED BY THE DISTRICT COURT

The district court certified a class in 1972 to include all black female employees and applicants at Travenol's plant, but limited the class to exclude all applicants who applied before March 3, 1970, and did not reapply thereafter. As initially certified, the class also included black male employees and applicants, but in 1974 the court granted the defendant's motion to exclude black males from the class. The court made its class certification final in December, 1976, and authorized an interlocutory appeal of this order under 28 U.S.C.A. § 1292(b), but we declined to accept the appeal. The grant of injunctive

relief that we review today, therefore, awards relief only to those members of the class finally certified by order of the district court in December, 1976.[5]

Payne argues that the district court denied injunctive relief to two groups of persons who were shown at trial to be victims of discrimination. These two groups are black males, and applicants who applied before March 3, 1970 but not after that date. Both groups were denied relief because they fell outside of the confines of the class certified by the district court. Payne urges us to reverse these limitations on the class in order to afford full relief for all those entitled to it.

Before we may address these arguments, however, we must decide whether our jurisdiction to hear this interlocutory appeal from the grant or denial of an injunction encompasses the power to review the definition of a class, when injunctive relief was denied to persons excluded from the class. Travenol challenges our jurisdiction, claiming that under *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978), class certification questions may not be heard on interlocutory appeal. Because we find that the appellees read *Gardner* too broadly, we reject their arguments and conclude that the definition of the class may be reviewed to the extent that it led to the denial of injunctive relief.

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[5] The district court certified the following class:

> All present, past, and future black female employees and all present, past and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitations that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

A. Jurisdiction to Review the Definition of the Class

In *Gardner v. Westinghouse Broadcasting Co., supra,* the plaintiff brought a Title VII suit on behalf of herself and all female applicants and employees who might be subject to sex discrimination by the defendant employer. After the district court denied a pretrial motion for class certification, the plaintiff immediately appealed under 28 U.S.C. § 1292(a)(1), arguing that the refusal to certify the class effectively denied her much of the injunctive relief she sought. Refusing to allow the appeal, the Supreme Court held that a pretrial denial of class certification was not appealable as a refusal of injunctive relief under section 1292(a)(1). The Court noted that section 1292(a)(1) creates an exception to the policy against interlocutory and fragmentary appeals. The purpose of this exception is to give litigants a chance to gain effective review of orders with irreparable consequences. Concluding that the denial of class certification at the outset of the lawsuit does not carry a threat of irreparable harm, the Court declined to place class certification questions in the category of refusals of injunctive relief that may be appealed before judgment on the merits.

We address a different question than the one faced by the Supreme Court in *Gardner.* Here, the district court conducted a trial on the merits, granted an injunction, and withheld portions of injunctive relief because of the definition of the class. The appellant does not seek to appeal the ruling on the composition of the class as an independent matter. Rather, she challenges the district court's denial of injunctive relief, which, in turn, requires her to attack the order that led to the denial. That order was the district court's certification of the class. Our established power to review the denial of injunctive relief embraces the power to review the orders that underpin this denial.

The *Gardner* Court recognized that it was not presented with the question we answer today, and it limited its holding to the facts before it. In a footnote, the Court distinguished *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.,* 538 F.2d 164 (7th Cir. 1976) (en banc), *cert. denied,* 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976), in which the Seventh Circuit

reviewed the district court's denial of class certification when that denial led to the refusal of a preliminary injunction. 437 U.S. at 479 n.3. This appeal fits the *Jenkins* mold rather than *Gardner*. We agree with the *Jenkins* court.[6] To hold that section 1292(a)(1) does not permit interlocutory appeals of denials of class certification, even if injunctive relief might thereby be compromised, is one thing; to hold that section 1292(a)(1) does not permit review of the district court's definition of a class when a denial of injunctive relief turns on that ruling is quite another. We find nothing in *Gardner* that compels us to refrain from reviewing the contours of class composition when they shape the contours of injunctive relief.

We recently observed that otherwise unappealable orders may be reviewed when necessary to review a denial of injunctive relief. *Gould v. Control Laser Corp.*, 650 F.2d 617, 621, n.7 (5th Cir. 1981). The Supreme Court has gone even further in authorizing review of otherwise unappealable orders in a case properly before a Court of Appeals to review a preliminary injunction ruling. In *Deckert v. Independence Shares Corporation*, 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189 (1940), the district court had denied the defendants' motions to dismiss, then granted a preliminary injunction. The defendants appealed from the injunction and the Court of Appeals reversed not only the injunction but also the district court's denial of the motions to dismiss. The Supreme Court held that the Court of

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[6] The case for reviewing the class question here is even stronger than in *Jenkins*. In *Jenkins*, the district court denied a pretrial motion to certify a class, and then refused a preliminary injunction. The Court of Appeals entertained an appeal of this ruling before a trial on the merits as is authorized by section 1291(a)(1). Here, by contrast, though we are not reviewing a final judgment, we are presented with a case in a considerably advanced stage of litigation. A two week trial on the merits has occurred, as well as further hearings aimed at developing appropriate relief; the class question has been treated as final by the district court for at least five years; and the decree entered by the court is a comprehensive resolution of all issues in the case except back pay. *Gardner* sought to promote the policies against fragmentary and uncoordinated interlocutory appeals. These policies have much less force when applied to a case like this one. Judicial economy is furthered by our present consideration of the class definition issues. To postpone consideration of these issues until after the adjudication of back pay only threatens to delay final resolution of this case.

Appeals "properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision." 311 U.S. at 287, 61 S.Ct. at 232. We have followed *Deckert* in *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir. 1977), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977), *modified on other grounds*, 556 F.2d 758 (5th Cir. 1977), and in *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973). We need not rely here on the theory of *Deckert*, however. The questions concerning class certification that Payne raises are directly tied to the partial denial of an injunction that is properly before us. We therefore have power to resolve the questions of class definition as an incident of our review of the injunction. *Accord: Adashunas v. Negley*, 626 F.2d 600, 602-03 (7th Cir. 1980).

B. Black males

We now turn to Payne's challenge to the exclusion of black males from the class. To place this challenge in perspective we review the history of the district court's treatment of the class as it bears on this issue. This case was filed as a class action on March 2, 1972, by three named plaintiffs: two black females, Willie Mae Payne and Alma Jean Williams, and one black male, James Williams. The complaint alleged that Travenol discriminated against all three and the class they represented on the basis of race. On November 16, 1972, the court conditionally certified the plaintiff class to include all black applicants and employees.

On May 1, 1973 the court permitted Willie Mae Payne to amend her complaint. The amended complaint alleged sex discrimination as well as race discrimination. On May 8, 1973, the court granted James Williams' motion to withdraw from the case because of his religious views. More than one year later, on July 31, 1973, two black females, Delilah Cherry and Birdie Lee Griffin, were permitted to intervene in the case alleging race and sex discrimination. These developments prompted the defendants to move the district court to redefine the class, and on December 20, 1974, the district court did so. The new class excluded black males, and other changes were made in the composition of the class.[7]

The district court made no written findings on its reasons for excluding black males, but the transcript of a hearing on the issue reveals that the district court was swayed by two factors. First, the district court noted that no male plaintiff remained in the case after James Williams' withdrawal. The only remaining plaintiffs were black females. Second, the court believed that a conflict existed between the interests of black males and the black female plaintiffs who sought to represent them. The black females charged sex discrimination in the assignment of material handlers. According to the court, this created a conflict because to the extent that females proved sex discrimination, the interests of males would be impaired.[8] The court thus concluded that black females could not adequately represent the interests of black males.

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[7] The plaintiffs had sought in the trial court to represent white females. The district court denied the motion on December 20, 1974, and the plaintiffs do not challenge that ruling on this appeal.

[8] The district court stated: "I think there is too much conflict between the males and the females in this situation for them to represent a class which would involve black males, or males of either race. There is a controversy in this case with reference to whether or not females should be permitted to be employed in the position of material handler in the plant, because they have always been assigned to and employed in the assembly part of the plant, and in that category which carries, as I understand it, a lower rate of pay. If these black female plaintiffs are going to get into a controversy with males, either white or black, then I don't think they can represent the male population of the plant so far as males or [sic] concerned, or for that matter any males who may have any interests in retaining their jobs as material handlers."

After this ruling, counsel for the plaintiffs requested that black males be sent notice of their provisional exclusion from the class and of the need for one of them to step forward if black males were to remain in the case, but the district court declined. The court directed, however, that members of the new provisional class receive notice of their inclusion in the case and be given an opportunity to opt out. On December 8, 1976, after trial, the court made its class-definition order final.

The appellants contest the redefinition of the class to exclude black males on two grounds. First, Payne denies the existence of a conflict between black females and black males that warrants excluding males from the class. Second, Payne argues that black males had a stake in the litigation because of their provisional inclusion in the class, *see Sosna v. Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and the district court had an obligation to protect their interest. The district court, therefore, should have sent notice to black males to permit one to intervene as a plaintiff. Had this been done, the class could have been subdivided to remove the conflict between the interests of black females and black males.

The first inquiry must be whether the district court erred in denying that black females may represent a class including black males in a mixed sex and race discrimination suit. The district court's decision on the scope of the class can be overturned only for abuse of discretion. *McGowan v. Faulkner Concrete Pipe Co.,* 659 F.2d 554, 559 (5th Cir. 1981); *Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1038-39 (5th Cir. 1981); *Walker v. Jim Dandy Co.,* 638 F.2d 1330, 1334 (5th Cir. 1981).

We start with the language of Rule 23. Under Rule 23(a) one of the four prerequisites to a class action is that "the representative parties will fairly and adequately protect the interests of the class."[9] Fed.R.Civ.P 23(a). The claim that black females hold interests in conflict with the interests of black males, if true, is sufficient to defeat the adequacy of their

[9] All four prerequisites of Rule 23(a) must be met before certification of a class is appropriate. *Huff v. N.D. Cass Co.,* 485 F.2d 710 (5th Cir. 1973) (en banc). Of course, the court must go on to decide if the further requirements of Rule 23(b) are satisfied before certifying the class.

representation. "It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." 7 C. Wright & A. Miller, Federal Practice & Procedure § 1768 at 638 (1972); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

Of course, in an employment discrimination case the court must interpret Rule 23 to accommodate the substantive policies of Title VII. *See Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420 (N.D.Tex.1979). We have repeatedly upheld the maintenance of across-the-board Title VII class actions in which, for example, an employee complaining of race discrimination represents not only other employees but also applicants suffering similar discrimination.[10] An across-the-board Title VII attack requires only that there be a sufficient "nexus" between the claims of the named plaintiff and the claims of the class. *Payne* I, 565 F.2d at 900. Yet, while Title VII policies support a broad reading of Rule 23, they do not justify the jettison of the cardinal principle that a class representative may not head a class including persons whose interests substantially conflict with his or her own. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453 (1977).

The conflict found by the district court here is straightforward: the female plaintiffs asserted that Travenol discriminates against females by typically assigning them to the lower-paying job of assembler while typically assigning males to the higher-paying job of material handler. The females, therefore, sought to establish that males were favored at their

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[10] *See Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981); *Falcon v. General Telephone Company of the Southwest*, 626 F.2d 369 (5th Cir. 1980), *vacated and remanded on other grounds*, 450 U.S. 1036, 101 S.Ct. 1752, 68 L.Ed.2d 234 (1981), *reinstated in part and remanded in part*, 647 F.2d 633 (1981), *cert. granted*, ____U.S.____, 102 S.Ct. 668, 70 L.Ed.2d 637 (1981); *Long v. Sapp*, 502 F.2d 34 (5th Cir. 1974); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970), *cert. denied*, 400 U.S. 951, 91 S.Ct. 241, 27 L.Ed.2d 257 (1970); *Johnson v. Georgia Highway Express, supra.* We upheld the right of the plaintiffs in this case to prosecute an across-the-board Title VII action in *Payne* I, 567 F.2d at 900.

expense. This claim plainly draws the interests of males into conflict with the interests of females.[11] We are aware of no case holding that a black female plaintiff is an adequate representative of black males in a sex and race discrimination suit when the interests of the two groups conflict.[12] On the contrary, a host of district courts have refused to permit black females to represent black males in class actions alleging both race and sex discrimination when a conflict of interest appears.[13]

A court should not lightly reject a black female's claim to represent all blacks and all females in a sex and race discrimination suit. Rather than determine the question of conflict abstractly, the court must examine the interlacing allegations of race and sex discrimination to determine whether an actual conflict exists. For example, if a black female plaintiff argues

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[11] "On the one hand, [the black female plaintiff] would argue that defendant's policies and practices discriminated in favor of males, including black males, and against females. At the same time, she would claim that defendant favored whites, including white females, over blacks. In light of these conflicting positions, plaintiff would not be an adequate representative of either black males or white females." *Colston v. Maryland Cup Corp.*, 26 F.R.Serv.2d 940, 943 (D.Md.1978).

[12] The only Circuit to have ruled on the propriety of a black female representing blacks and females in a mixed sex and race discrimination suit is the Eighth. In *Donaldson v. Pillsbury*, 554 F.2d 825 (8th Cir. 1977), *cert. denied*, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977), the Court held that a black female alleging both race and sex discrimination had claims that were typical of all female and all black employees and, therefore, she could represent them. "Typicality" under Rule 23(a)(3) was the sole issue in the case; the Court did not discuss possible conflicts of interest between the plaintiff and the class that might render her representation inadequate under Rule 23(a)(4). Moreover, the plaintiff in *Donaldson* alleged that the defendant employer favored white men at the expense of both blacks and females. 554 F.2d at 830. Thus, the conflict we find here was not present in *Donaldson*.

[13] *See Strong v. Arkansas Blue Cross & Blue Shield, Inc.*, 87 F.R.D. 496 (E.D.Ark.1980); *Hammons v. Folger Coffee, Inc.*, 87 F.R.D. 600 (W.D.Mo.1980); *Edmondson v. Simon*, 86 F.R.D. 375 (N.D.Ill.1980); *Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420 (N.D.Tex.1979); *Colston v. Maryland Cup Corp.*, 26 F.R.Serv.2d 940 (D.Md.1978); *Droughn v. FMC Corp.*, 74 F.R.D. 639 (E.D.Pa.1977); *Martinez v. Bechtel Corp.*, 21 F.R.Serv.2d 85 (N.D.Cal.1975); *Arey v. Providence Hospital*, 55 F.R.D. 62 (D.D.C.1972).

that the employer favors white males to the detriment of both females and blacks, there is no inherent obstacle to her representation of both groups. *See Donaldson v. Pillsbury,* 554 F.2d 825 (8th Cir. 1977), *cert. denied,* 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977); *Vuyanich v. Republic National Bank of Dallas, supra,* 82 F.R.D. at 435. In this case, however, the district court found an actual conflict of interests and we see no error in this conclusion.

The plaintiffs argue that because both blacks and women were adequately represented at trial, the existence of a possible conflict between the two before trial is not relevant. We reject this argument. It is true that the court's responsibility to assess the adequacy of representation is an ongoing one. The district court may decertify a class after trial if plaintiff's trial performance showed him or her to be an inadequate class representative. *Johnson v. Uncle Ben's, Inc.,* 628 F.2d 419 (5th Cir. 1980), *vacated and remanded on other grounds,* 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981). But the trial court is not required to hypothesize about the effect of an actual conflict of interests on the adequacy of plaintiffs' representation. It is enough to deny representation that the conflict is actual at the outset of the trial.

The plaintiffs also argue that black males have no "legally cognizable" interest in perpetuating sex discrimination at Travenol's plant, and we agree. But black males do have an interest in representation of their interests with undivided loyalty. The existence *vel non* of sex discrimination is at issue in this case. Black males are entitled to a class representative who is free from a desire to prove a claim that will impair their interests.

Finally, the plaintiffs contend that we must balance the harms to black males flowing from their inclusion in the class against the harms flowing from their exclusion. Payne maintains that the harms of excluding black males overshadow the potential harms of including them. The district court's ruling deprives black males of the benefits accorded to class members, including constructive seniority and back pay. To include them in the class despite the conflict of interest, Payne argues, would

have brought them much less harm. This argument diverts attention from the proper inquiry under Rule 23. Rule 23 forces a court to measure the adequacy of representation because of the sensitive considerations involved in binding parties not before the court to a judgment won or lost by class representatives. *See Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). A court need not look beyond the issues in the suit before it to determine when a conflict of interest precludes adequate representation. We conclude, therefore, that the district court was within its discretion in excluding black males from the class.

Ordinarily, if a court discerns a conflict like the one in this case, the proper solution is to create subclasses of persons whose interests are in accord. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). Of course, each subclass must be headed by a person who claims the same injury as the subclass, but who lacks the fatal conflict. *See East Texas Motor Freight System, Inc. v. Rodriguez, supra; Johnson v. American Credit Co.*, 581 F.2d 526, 532-33 (5th Cir. 1978). In this case, after the sole black male plaintiff, James Williams, withdrew from the case, no named plaintiff existed to head a class of black males. Payne therefore argues that having provisionally included black males in the class, the district court owed black males a duty to send them notice of their pending exclusion from the case to allow one of them to step forward to intervene. We do not find this obligation in the law.

Rule 23 requires a district court to give notice to absent class members of developments in the suit in only two situations. The first is when the court certifies a class under Rule 23(b)(3) because of common questions of law or fact that predominate over other aspects of the suit and render a class action the appropriate vehicle to resolve the claims. Fed.R.Civ.P. 23(c)(2); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The second is when a class action is to be dismissed or compromised. Fed.R.Civ.P. 23(e).[14] In all other cases, notice lies within the

[14] The plaintiffs have not argued that the redefinition of the class in this case is a dismissal within the meaning of Rule 23(e), and we do not consider it to be one.

district court's discretion. Fed.R.Civ.P. 23(d)(2). The district court thus had discretionary power to give black males notice of their impending exit from the case. Such action in general is to be encouraged.[15] We cannot say, however, that the court transgressed its authority in failing to recruit a new black male plaintiff to intervene to permit subdivision of the class. *Cf. United States Parole Commission v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 1214, 63 L.Ed.2d 479 (1980) (after denying class certification, a district court must give the representative of the plaintiff class an opportunity to propose subclasses, but has no obligation to construct them itself).

Were we to accept Payne's reasoning, a district court that provisionally certified a class but later concluded that the existing class representative was inadequate would have to send notice soliciting a new class representative. Plainly, that is not the rule in this Circuit, *see Johnson v. Uncle Ben's, Inc., supra*, 628 F.2d at 423, nor should it be. The rule that Payne proposes would shift a burden onto the district court that properly remains with the plaintiff.[16] Only if the black males had

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[15] In *Silva v. Vowell*, 621 F.2d 640, 649 (5th Cir. 1980) (quoting *Johnson v. American Credit Co., supra*, 581 F.2d at 533 n.13), *cert. denied*, 449 U.S. 1125, 101 S.Ct. 941, 67 L.Ed.2d 111 (1981), we stated that if the court had found no named plaintiff qualified to represent a subclass, "the court could have considered 'whether it is in the interest of justice and judicial economy to postpone dismissal as to the subclass for a specified period in which members of the subclass could become plaintiffs by amendment of the Complaint or by intervention and thereby save the subclass action.' " In *Sullivan v. Winn-Dixie Greenville Inc.*, 62 F.R.D. 370, 377 (D.S.C.1974), the court followed this procedure but did not require notice to the subclass members. *But see Alexander v. Avco Corp.*, 380 F.Supp. 1282, 1286 (N.D.Tenn. 1974), (the court gave notice to class members to give them an opportunity to intervene as individuals before dismissing the class action) *modified*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978).

[16] At oral argument, plaintiffs' counsel advised this Court that counsel failed to seek a black male plaintiff to intervene on his own because of doubts that attorneys for the plaintiffs could freely communicate with class members. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) made clear that a district court may not curtail communications between the attorney for the plaintiff and class members, at least in the absence of specific findings that such an order is appropriate or necessary to prevent abuses. 101

(footnote continues)

received notice of their initial inclusion in the class, had relied on the class suit to protect their rights, and would be prejudiced as a practical matter by exclusion from the class might the district court be obligated to take some action to safeguard their interests. *See Seligson v. Plum Tree, Inc.*, 61 F.R.D. 343, 346 (E.D.Pa.1973); *Berse v. Berman*, 60 F.R.D. 414, 416 (S.D.N.Y. 1973). Here, there is no showing that black males relied to their detriment on the district court's provisional inclusion of them in the class. In the absence of such a showing, we decline to hold that the district court abused its discretion in failing to give them notice. In sum, the district court on this record was justified in its discretion in believing that recruiting black males after the one black male had dropped out almost two years before would constitute the stimulation of a new law suit by the court rather than a continuation of the old.

C. Opening date for class membership

We now take up Payne's argument that injunctive relief was improperly limited because the district court fixed an incorrect opening date for membership in the class. The district court limited the class to black females who applied at Travenol after March 3, 1970. Neither party is certain why the district court chose this date, and the court itself gave no reason. Payne urges us to move the date back to include all applications within the limitations periods for both Title VII and Section 1981. Travenol resists any extension and maintains that despite some difficulties in the date chosen by the district court, there is no abuse of the court's discretion. We are persuaded that the court did abuse its discretion in choosing the opening date, although our analysis differs from either of the parties'.

The opening date for membership in a class for a Title VII claim should be set by reference to the earliest charge filed by a named plaintiff. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d

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(footnote continued)

S.Ct. at 2193. Although in 1974 the plaintiffs lacked the guidance of *Gulf Oil*, nothing in the record indicates that the plaintiffs asked the district court to allow them to communicate with the class. We cannot impose a duty on the district court to fill the void created by the plaintiffs' failure to press their rights to communicate with persons excluded from the class.

429, 472 (D.C.Cir.1976) *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). *See also Crawford v. Western Electric Co.*, 614 F.2d 1300, 1309 (5th Cir. 1980). *But see Chisholm v. United States Postal Service*, 665 F.2d 482, 489 (4th Cir. 1981) (opening date for class membership set by reference to the date from which a named plaintiff could collect back pay). Here, that plaintiff is Willie Mae Payne, who filed her first charge on January 29, 1970.[17] For Title VII purposes, Payne can represent a class that includes all qualifying[18] black female applicants who could have filed a timely charge with the EEOC when she did.[19] *See*

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[17] There are at present three named plaintiffs in this case. Willie Mae Payne acquired a tenth grade GED on January 20, 1970. She applied at the Mississippi State Employment Service (MSES) for a referral to Travenol on January 29, 1970, but MSES did not refer her. Payne went to Travenol anyway, applied, and was refused a job. She filed two charges with the EEOC, the first on January 29, 1970 because of Travenol's rejection of her on that date, then on March 3, 1970, because of Travenol's rejection of her again on February 24. On March 17, 1970, Payne was referred by MSES and was refused employment a third time. No charge appears to have been filed in reference to the March 17 application. Nothing in the record indicates that MSES referred Payne before March 17.

Delilah Cherry obtained her GED in 1967, was referred by MSES shortly thereafter, and was denied employment over the next two years despite repeated visits and phone calls to Travenol. She filed two EEOC charges, the first on August 14, 1970, the second on January 12, 1971.

Birdie Lee Griffin completed eleven years of school, was referred by MSES in 1966, and was refused employment despite renewed requests on abundant instances over the next four years. Her first EEOC charge is dated August 28, 1970. Like the other two plaintiffs, she filed a second charge, which the EEOC received on January 12, 1971.

[18] The district court certified a class of black female applicants subject to two limitations, which are in addition to the date of application. First, the applicant must possess a tenth grade education. Second, she must have been referred by MSES during the time such referral was required.

[19] Payne's first charge covers Travenol's alleged discriminatory acts that occurred after she filed it because they are sufficiently related to the allegations of the first charge. *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678, 689 n.6 (5th Cir. 1975); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973). *See generally Sanchez v. Standard Brands, Inc., supra.* Thus, the January 29, 1970 charge encompasses Travenol's rejection of Payne on March 17, 1970, after she was referred by the MSES.

Laffey v. Northwest Airlines, Inc., supra; Wetzel v. Liberty Mutual Insurance Co., supra. The charge filing period in 1970 was ninety days after the alleged act of discrimination.[20] *See Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970). Thus, the opening date for the Title VII race discrimination class, counting back ninety days from the date of the January 29 charge, is October 31, 1969. All black females who satisfy the other requirements of class membership and who applied on or after October 31, 1969, should be members of the class for purposes of Title VII race discrimination. The district court's later date cannot be sustained.[21]

For the Title VII sex discrimination claim, the opening date of the class is October 31, 1969, the same date as for the Title VII race discrimination claim, because Payne's January 29, 1970, charge with the EEOC alleged both race and sex discrimination. Any black female employee or applicant suffering sex discrimination on or after this date could have filed a timely charge of sex discrimination with the EEOC by the date Payne filed her charge. Thus, the sex discrimination

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[20] The statute was amended in 1972 to provide for a 180-day charge filing period. *See Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261*, 86 Stat. 113, *codified at* 42 U.S.C.A. § 2000e.

We hold that the ninety-day charge-filing period, which was in effect before the 1972 amendments to Title VII, should govern this case. We reach this conclusion even though the right-to-sue letter on the charge that we use to set the opening date of the class was not issued until September 6, 1972, after the effective date of 1972 amendments on March 24, 1972. Because Payne's amended complaint relates back to the date of the original complaint, Fed.R.Civ.P. 15(c), this case clearly was not pending with the EEOC on the effective date of the 1972 amendments. Therefore, the ninety day period is binding on Payne and the class she represents.

[21] The court apparently chose this date because it was the date of Payne's second EEOC charge. When the original complaint in federal court was filed on May 2, 1972, Payne did not allege having filed charges with the EEOC on January 29, 1970; only the March 3 charge was mentioned in the complaint. The district court certified the class conditionally on November 16, 1972. Payne's amended complaint, filed May 3, 1973, did allege having filed a charge with the EEOC on January 29, 1970, but the district court failed to modify the opening date of the class to reflect the amended complaint. In any event, the court should have set the opening date of the class to include all persons who could have filed charges when Payne did instead of setting the opening date of the class on the date when she filed her charge.

claims take in a class of black female employees or applicants beginning on October 31, 1969.

Our inquiry is not ended here, however, because the plaintiffs alleged violations of 42 U.S.C.A. § 1981 as well as violations of Title VII. Although both of these statutes apply to employment discrimination cases, they have independent remedies and independent statutes of limitations. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). Though both the district court's decision on liability and our earlier decision in this case failed to mention Section 1981, there can be no doubt that the Section 1981 claim was properly pleaded and adjudicated. The decree that we review today enjoins subjective employment practices in violation of Section 1981, a ruling that must be premised on a finding of Section 1981 liability. We therefore examine what the appropriate Section 1981 class opening date should be. *Cf. McWilliams v. Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981) (the Court separately examined whether a charge had been timely filed under Title VII and whether the acts complained of occurred within the statute of limitations for Section 1981 and Section 1983 before concluding that all claims were time-barred); *Crawford v. Western Electric Co., supra*, 614 F.2d at 1309. *Petty v. Peoples Gas Light and Coke Co.*, 86 F.R.D. 336, 342-43 (N.D.Ill.1979).

Statutes of limitations for Section 1981 actions ordinarily are borrowed from state law. *Johnson v. Railway Express Agency, supra*, 421 U.S. at 462, 95 S.Ct. at 1721. In *Truvillion v. King's Daughters Hospital*, 614 F.2d 520 (5th Cir. 1980), we held that a Section 1981 claim for a discriminatory refusal-to-hire is governed by the six-year Mississippi general statute of limitations.[22] 614 F.2d at 528. At least one of the named plaintiffs here, Birdie Lee Griffin, applied for a job with Travenol in 1966 after receiving an MSES referral, and was refused employment. *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. at 252. Thus, if the proof supports it the plaintiffs may

[22] Mississippi Code Annotated, Section 15-1-49 (1972) provides:

> All actions for which no other period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

represent a Section 1981 race discrimination class that begins six years before the date when the complaint was filed in 1972, or March 2, 1966. Section 1981, of course, does not embrace sex discrimination claims, *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340 (5th Cir. 1981).

III. PROOF OF DISCRIMINATION

We come now to the merits of the plaintiffs' claim that Travenol's hiring, job assignment, promotion, and pay practices were discriminatory.[23] The district court found for the plaintiffs on most but not all liability issues. On appeal, the plaintiffs charge error in the district court's failure to find discrimination on the remaining issues. But for the educational requirements that we struck down in *Payne* I, 565 F.2d at 899-900, the defendant contends that the district court erred in finding any discrimination at all. We take up each issue in turn.

A. Discrimination in hiring.

At the outset, we note one difficulty in assessing the proof of discrimination in hiring. When this case was tried, the plaintiffs principally, though not exclusively, strived to prove that Travenol's hiring of operatives discriminated against blacks because of the minimum requirement of a tenth-grade education. *See Payne v. Travenol Laboratories, Inc.*, 416

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[23] The plaintiffs alleged discrimination in four areas that are relevant to this appeal:

1. *Discrimination in hiring into entry level positions.* Travenol did not hire blacks at the same rate as whites, comparing applicant flow to hires.

2. *Discrimination in initial assignment of those hired.* Travenol assigned blacks disproportionately to custodial rather than operative work.

3. *Discrimination in promotions.* Travenol hindered the advancement of women from assembler to material handler, and offered both women and blacks scarcely any opportunity for promotion above the operative level.

4. *Discrimination in merit pay.* Travenol paid less to blacks and women in positions above the operative level for which the salary is determined subjectively through the merit system.

F.Supp. at 255. Proof of such disparate impact discrimination under Title VII is governed by *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). *Griggs* holds that a facially neutral employment practice that imposes a greater burden on one group than another violates Title VII unless the employer establishes that the practice arises from business necessity. A disparate impact plaintiff need not show intentional discrimination. 401 U.S. at 430-32, 91 S.Ct. at 853-54. A large quantity of Payne's evidence was aimed precisely at the *Griggs* elements of proof. Of course, Payne also introduced testimony and statistics undertaking to show the opportunity for and the existence of subjective, intentional discrimination in Travenol's hiring process—disparate treatment.

Confronted with this evidence, the district court found that Travenol hired proportionately fewer blacks, stating: "This disparate result reflects the effect of a tenth-grade requirement and of the defendants' subjective discrimination." 416 F.Supp. at 248. The district court then struck down the tenth grade requirement, rejecting Travenol's business necessity defense. In *Payne* I, we reversed the injunction against the tenth-grade requirement, holding that no named plaintiff had standing to challenge it because each had a tenth grade education during the relevant period. 565 F.2d at 898-99.[24]

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[24] In *Payne I*, Payne argued that she had standing to challenge the tenth grade requirement because she lacked a tenth-grade equivalency for 80 of the 90 days preceding her January 29, 1970 EEOC charge. We rejected this argument, reasoning that "the trial court's definition of the class removed from consideration all applications for employment submitted to Travenol prior to March 3, 1970, so that the situation prior thereto is irrelevant on this appeal." 565 F.2d at 899.

The opinion in *Payne I* reveals that the parties did make some reference to the earlier suggested date of January 29, 1970, and a reference back to a period of up to ninety days preceding that date. It must be concluded, therefore, that the issue of the establishment of March 3, 1970, by the district court as the beginning date for applications of members of the class was considered by the Court in *Payne I* and became as a result of its holding the critical date for the class as it related to the tenth grade requirement. If the members of the class felt at that time that the decision was wrong because the precise date was wrong and that, therefore, they did have members of the class who did not have the tenth grade requirement or its equivalent at a proper date for the class they had the obligation to pursue their position further. They were required to raise that specific issue upon a motion for

(footnote continues)

The removal of the tenth-grade requirement issue transformed this case dramatically. As Travenol properly contends, the case must now be analyzed as a disparate treatment case rather than a disparate impact case. In a disparate impact case, the plaintiff need not prove intent to discriminate, while in a disparate treatment case, such proof is crucial. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977). The plaintiffs' proof must now be tested under disparate treatment principles.

With the removal of the tenth-grade requirement as an issue in this case, Payne's essential challenge is that Travenol's subjective interviewing process led to discrimination. Payne does not assert that Travenol applied distinct, facially neutral criteria to candidates in the interview that operate disproportionately to exclude blacks. Rather, Payne points to the absence of objective criteria and the resultant opportunity to discriminate subjectively in Travenol's hiring. In support of the contention that Travenol discriminated in hiring, Payne recites the history of Travenol's hiring, which reveals substantial pre-Act discrimination, and compares applicant flow to actual hires, stressing the consistently lower proportion of blacks than whites hired. Payne also adverts to individual instances of discrimination. This evidence falls into the classic pattern of a classwide disparate treatment case. *See Hazlewood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53

(footnote continued)

rehearing to this Court at the end of *Payne I.* Otherwise, the holding became and still continues to be the law of the case (*Conway v. Chemical Leaman Tank Lines,* 644 F.2d 1059 (5th Cir. 1981)) on that one issue. The parties cannot now be heard to urge that the tenth grade requirement as it relates to the class can be based upon a commencing date other than the one which was before the Court and upon which the Court clearly relied in making its decision.

This conclusion is buttressed by the fact that the issue of the validity and application of the tenth grade requirement was not raised upon the current appeal and is not before us. We, therefore, have considered the matter as to the proper date for the inception of the class only as it applies to issues other than the invalidated tenth grade requirement. That issue is foreclosed by *Payne I.*

L.Ed.2d 768 (1977); *International Brotherhood of Teamsters v. United States, supra; Wilkins v. University of Houston,* 654 F.2d 388, 394-95 (5th Cir. 1981); *Phillips v. Joint Legislative Committee,* 637 F.2d 1014, 1024-26 (5th Cir. 1981).

Travenol's interviewing cannot be viewed as a neutral practice with a disparate effect thus subject to *Griggs v. Duke Power Co., supra,* as Payne argues. Hiring processes that rely heavily on subjective interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case. Payne does not urge that Travenol has violated Title VII by seeking alert, capable operative workers; rather she charges that Travenol masked its intentional discrimination by purporting to screen applicants for these qualities while actually discriminating on the basis of race. Subjective discrimination in interviewing or in similar evaluation processess has repeatedly been held to fall into the disparate treatment branch of Title VII law. *See Hazlewood School District, supra,* 433 U.S. at 304, 97 S.Ct. at 2739-40; *Pouncy v. Prudential Insurance Co.,* 668 F.2d 795, at 801 (5th Cir. 1982) (subjective evaluation of employees is not a selection procedure tested under the disparate impact model); *Wilkins v. University of Houston, supra,* 654 F.2d at 394-94; *Phillips v. Joint Legislative Committee, supra.*

Because this case now raises claims of classwide disparate treatment, we must evaluate the evidence in light of standards established by the Supreme Court in such cases in *Teamsters and Hazelwood. See Pouncy v. Prudential Insurance Co., supra. Teamsters* and *Hazelwood* establish that in a Title VII disparate treatment class action, the plaintiff has the burden of proving a prima facie case that the defendant's regular practice was to discriminate intentionally against a protected class. The burden may be met solely with statistics if they show a sufficiently great disparity between the employer's treatment of blacks and of whites—a disparate result. In such circumstances, statistics alone justify an inference of discriminatory motive. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265-66, 97 S.Ct. 555, 563-64, 50 L.Ed.2d 450 (1971). The statistical showing of disparate result may

also be buttressed with evidence of a history of discrimination practiced by the employer, individual instances of discrimination, and opportunities to discriminate that exist in the employer's decision-making processes. If the statistical disparity is insufficient alone to establish a prima facie case, the plaintiff may get over his or her initial hurdle by combining statistics with historical, individual, or circumstantial evidence. *See EEOC v. American National Bank*, 652 F.2d 1176 (4th Cir. 1981).

Once the plaintiff has shown a prima facie case that the employer has pursued a policy of discrimination, the employer may undertake to rebut this showing. The rebuttal can proceed along two fronts. First, proof that the plaintiff's statistics are inaccurate or insignificant may dispel the plaintiff's proof of disparate result. For example, the employer may show that the disparity between the percentage of minorities in his work force and in the general population results from discrimination before the enactment of Title VII. Second, the employer may seek "to provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 431 U.S. at 360 n.46, 97 S.Ct. at 1867 n.46. General assertions of good faith or of hiring only the best applicants, however, are insufficient to meet this burden. *Id.* at 342 n.24, 97 S.Ct. at 1858 n.24. If the employer fails to rebut the plaintiff's case, the district court may conclude that Title VII has been violated. *Id.* at 361, 97 S.Ct. at 1867.

Discriminatory treatment claims under § 1981 are measured by the same standards that apply to discriminatory treatment claims under Title VII. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982); *McWilliams v. Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981). Thus, we apply the *Teamsters* pattern of proof to the § 1981 claims as well as the Title VII claims in this case.

The defendants argue that because this is a disparate treatment case, the burdens of proof and production must conform to the model established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community*

Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).[25] We have held, however, that *McDonnell Douglas* and *Burdine* establish the model of proof only for an *individual* disparate treatment case. In a class action we adhere to the pattern of proof set out in *Teamsters* and *Hazelwood*. Our cases have recognized the distinction between individual and class claims of disparate treatment, *see Phillips v. Joint Legislative Committee, supra*, 637 F.2d at 1024-27 (5th Cir. 1981), and have consistently applied the *Teamsters* model of proof to the class claims, *e.g. Markey v. Tenneco Oil Co.*, 635 F.2d 497, 499 (5th Cir. 1981). Nothing in *Burdine*, a single-plaintiff case, suggests that the Court intended *Burdine* procedures to supplant the procedures for proving classwide disparate treatment announced in *Teamsters* and *Hazelwood*. *See Vuyanich v. Republic National Bank of Dallas*, 521 F.Supp. 656 (N.D.Tex.1981).

We now turn to the question whether the district court's findings support an inference of classwide *disparate treatment* under *Teamsters*. In answering this question we recite the statistical and other facts reported in the opinion of the district court that can, if supported in the record, establish discrimination absent the tenth-grade requirement. Travenol asserts that the district court made a finding of discrimination only by overlaying the disparate effects of the tenth-grade education requirement and the subjective screening accomplished through interviewing. Because the district court never considered the independent effect of interviewing, Travenol maintains, there is no finding that interviewing, without regard to the tenth-grade requirement, is discriminatory. The district

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[25] *Burdine* holds that an individual seeking to prove discriminatory treatment must establish a prima facie case according to *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The defendant then has the evidentiary burden of articulating a reasonably specific, legitimate reason for its action. If the defendant meets this burden, the plaintiff then must show that the defendant's reason is a pretext for discrimination. *See McWilliams v. Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981).

The Third and the Ninth Circuits have applied *Burdine* to Title VII class actions. *See Croker v. Boeing Co.*, 662 F.2d 975 (3d Cir. 1981) (en banc); *Piva v. Xerox Corp.*, 654 F.2d 591 (9th Cir. 1981).

court's findings, by its own admission, are "brief and to some extent conclusory." 416 F.Supp. at 255. Nevertheless, we believe that they are adequate to support a conclusion of classwide discrimination, without regard for the tenth-grade requirement.

First, the district court found that Travenol hired proportionately fewer blacks than whites from candidates referred by MSES.[26] Because MSES referred only candidates possessing a tenth-grade education, this finding is untouched by our holding in *Payne* I that the plaintiffs could not challenge the tenth-grade requirement. The district court also found that after Travenol ceased to require referral from MSES, its hiring continued to exclude blacks disproportionately.[27] This finding reflects both Travenol's imposition of the tenth-grade requirement and its subjective discrimination. The court, therefore, did not state how much of Travenol's disproportionate exclusion of blacks was attributable to subjective discrimination, but its finding clearly implies that some of it resulted from such discrimination.

In addition to these findings, the court relied on work-force statistics.[28] These statistics show a slow rise in the percentage of blacks in Travenol's plant from 1964, when there were none, to

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[26] The district court cited no statistics to support this finding of disparate result. We consider later whether this finding is clearly erroneous in light of the statistics submitted by the parties.

[27] The court found that Travenol hired one of three white applicants but only one of six black applicants between April 1971 and August 1974.

[28] The statistics relied on by the court showed the following percentages of whites in the operative work force.

Year	Percentage of the operative work force that was white:		
	All	Male	Female
1964	100	—	—
1966	84	—	—
1969	—	82%	89.8%
1970	—	76.6%	82.8%
1973	—	54.1%	70.1%
1974	—	37.4%	57.5%

1971, when blacks composed nearly 25% of male operatives and slightly more than 20% of the female operatives. After 1972, when the plaintiffs filed suit, the percentage of blacks grew rapidly.

Thus, the district court clearly found that Travenol's hiring had a disparate result, even without regard to the tenth-grade requirement. Although its statistical findings are not elaborate enough to permit us to conclude that Payne established a prima facie case through statistics alone, the court also made historical, circumstantial, and individual findings that buttress the statistics. The findings of disparate result coalesce with Travenol's history of discrimination, the opportunities in its hiring process to discriminate, and individual instances of discrimination, all to establish a prima facie case.

Travenol's entire work force, but for custodial positions, was exclusively white until 1964.[29] Before 1964, Travenol hired persons, without regard to educational requirements, based on subjective impressions gained through interviewing. Community references were used heavily in the plant's early years, but took on less importance in the 1960s. Following the passage of Title VII in 1964, the plant's personnel manager sought the assistance of MSES in evaluating how Travenol could bring blacks into the operative work force. MSES performed a study and recommended that Travenol require a twelfth-grade education for operative positions. Travenol refused to set such a high standard, instead requiring a tenth-grade education or GED. It is unclear why Travenol decided that it needed any educational requirement for the first time only after the passage of Title VII. Travenol also invoked the services of MSES to screen and refer applicants to the plant.

Between 1965 and 1971 Travenol considered only those applicants referred by MSES. The referred applicants were then interviewed by the plant's personnel manager. Travenol's personnel manager between 1965 and 1967 hired applicants based

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[29] Although liability under Title VII cannot rest on Travenol's pre-Act discrimination, its conduct before 1964 is relevant to the interpretation of post-Act disparate results. *See Hazelwood School District, supra,* 433 U.S. at 309 n.15, 97 S.Ct. at 2742 n.15.

on his interview impression and the recommendation of plant employees whom he consulted about the applicants. The first personnel manager initiated a practice of consulting a black employee, Julius Lucas, about black applicants, and this practice was continued by his successors until 1971. The personnel manager during 1967 and 1968 consulted members of the local community as references to supplement his reaction to applicants gained through interviewing. The personnel manager from 1968 to 1974 made his hiring decisions almost exclusively by his subjective impression at the interview.[30] At no time either before or after Title VII's enactment did Travenol give its personnel managers written instructions on standards to apply in hiring.

The district court also found that all three of the named plaintiffs belonged to a racial minority, were qualified for the operative position they sought, and were rejected by Travenol. It is also abundantly clear from the district court's opinion that Travenol continued to hire white applicants for operative positions after these rejections. Thus, each named plaintiff fulfilled the four-part test of establishing a prima facie case under *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[31] There is no indication in the district court's findings that Travenol rebutted the inferences of individual discrimination that arose from the plaintiffs' showings.

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[30] The factors considered by the third personnel manager were alleged to be "personal cleanliness, general alertness, and comprehension." No fixed list of questions was used to measure these qualities; the questions varied from applicant to applicant.

[31] Under *McDonnell-Douglas* the plaintiff may establish a prima facie case of individual disparate treatment by showing: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802, 93 S.Ct. at 1824. By noting that the named plaintiffs satisfied the *McDonnell-Douglas* criteria, we do not imply that proof of individual instances of discrimination presented to support a case of classwide discrimination must conform to *McDonnell-Douglas.*

These findings, evaluated in light of *Teamsters*, establish a strong prima facie case of disparate treatment, absent the tenth-grade requirement. The burden then fell on Travenol to rebut the plaintiffs' showing. The district court, however, made no findings that appear to us to blunt the plaintiffs' evidence. We conclude, therefore, that if the district court's findings are supported by the evidence, we are compelled to hold that Travenol's hiring violated Title VII and Section 1981.

We have now decided that the district court's findings, if correct, warrant a conclusion that unlawful discrimination actually occurred. We now turn to evidence of discrimination in hiring to see if it supports the district court's findings of fact. In assessing this evidence, we apply the clearly erroneous standard to the district court's subsidiary findings of fact. *Rivera v. City of Wichita Falls*, 665 F.2d at 535-36. *Danner v. United States Civil Service Commission*, 635 F.2d 427, 430-31 (5th Cir. 1981).

Travenol asserts that the district court's finding of a disparate result in hiring is clearly erroneous in that it is unsupported by competent statistical evidence. Travenol argues that all the statistics in the record on applicant flow combine applicants who had a tenth-grade education and applicants who were without a tenth-grade education. If Travenol were correct, the district court's finding of a disparate result in hiring that was the product of discrimination in interviewing could not be sustained. The statistics in the record, however, amply support the district court's findings and we may not set them aside as clearly erroneous.

First, Payne introduced statistics that show that between November 1969 and November 1971, Travenol hired only 24.3% of black females applicants referred by MSES for operative positions and 21.0% of black males, while hiring

44.3% of the white males and 51.7% of the white females.[32] Payne's evidence also shows that between 1970 and 1974, Travenol hired 44.9% of white operative-job applicants with a tenth-grade education, but only 25% of black applicants sim-

[32] The following chart presents the breakdown of applicants and hires:

Hiring Rates of Applicants Referred by MSES, for Assembler and Material Handler Positions, from November 3, 1969 Through November 24, 1971

	White Males	Black Males	White Females	Black Females
Total Applicants Referred...	293	138	503	440
Total Referrals Hired	130	29	260	107
—Percent Hired.....	44.3%	21.0%	51.7%	24.3%

The calculation of standard deviations though not essential, *see Rivera v. City of Wichita Falls*, 665 F.2d at 545, n.21, is extremely useful. Absent explanation, standard deviations of greater than three generally signal discrimination, *see Hazelwood School Dist.*, 433 U.S. at 311 n.17, 97 S.Ct. at 2743 n.17. Standard deviation analysis here reveals that the discrepancy between black and white hires is probative of discrimination. The observed number of hires is 7.54 standard deviations fewer than the expected number.

The "standard deviation" is a way to calculate the likelihood that chance is responsible for the difference between a predicted result and an actual result. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17, 97 S.Ct. 1272, 1281 n.17, 51 L.Ed.2d 498. For example, if we flip a penny one hundred times, we expect that fifty will be heads and fifty tails. If 51 flips out of 100 produce heads, we chalk it up to chance. But long before we get to 99 flips out of 100 producing heads, we suspect the penny. Standard deviation analysis is the mathematical means of expressing how likely it is that the penny is suspect. For hiring discrimination, the standard deviation is calculated by taking the square root of the product of the number of applicants hired times the probability of hiring a minority times the probability of hiring non-minority. In our penny example, the standard deviation is the square root of 100 times .5 (the probability of heads) times .5 (the probability of tails), or 5. If 100 flips yield 40 heads, the observed value falls two standard deviations below the expected value. The probability of this happening by chance is less than five times in 100. *Equal Employment Opportunity Comm. v. American Natl. Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981). The probability of 100 flips yielding 35 heads—or 3 standard deviations below the expected value—is less than one in 100. *Id.* Statisticians tend to discard chance as an explanation for a result when deviations from the expected value approach two standard deviations. *Id.*

ilarly qualified.[33] More specific statistics indicate that the disproportionate exclusion of blacks continued but was tapering towards the end of this period. In 1972 to 1974, Travenol hired 26.1% of the qualified white applicants while hiring 21.5% of the qualified black applicants.[34] The record contains no applicant flow statistics for the period between 1974 and 1976, although the decree includes class members up to February 19, 1976, the date when the district court rendered its decision on liability.

Travenol contends that flaws in Payne's statistics render them incompetent to support the district court's findings. We do not agree that the picture of discrimination suggested by these statistics is a mirage. While Travenol has exposed defects and gaps in the plaintiffs' statistics, none of them are fatal.

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[33] The plaintiffs set out the following table:

Applicants With a Tenth-Grade Education, From 1970-74, Compared With Hires Into Operative Positions, 1970-74

	Whites	Blacks
Applicants for Operative Jobs With a 10th Grade Education	1,478	2,193
Hires in Operative Jobs, 1970-74	664	548
% Hired	44.9%	25.0%

Calculation of standard deviations reveals that the observed number of black hires is 10.28 standard deviations fewer than the expected number.

[34] The plaintiffs presented the following chart:

Applicants With a Tenth-Grade Education, From 1972-74, Compared With Hires Into Operative Positions, 1972-74

	Whites	Blacks
Applicants for Operative Jobs With a 10th Grade Education, 1972-74	636	1,658
Hires in Operative Jobs, 1972-74	166	356
% Hired	26.1%	21.5%

The disparity, though less than earlier years, is still significant: the number of black hires falls short of the expected value by more than two standard deviations.

Travenol lodges several objections to the MSES statistics for 1969-1971. First, Travenol argues that the MSES data omit three months of statistics for material handlers and nine months for assemblers. We have condemned "extravagant extrapolation" from small samples, *Hester v. Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974). In *Hester*, we refused to accept the inference that because 50% of the persons who responded to an advertisement over a two-week period were black that the same percentage would be found to have responded to a series of ads over a two-year period. Plainly, the gaps in proof alluded to here are not of the magnitude we condemned in *Hester*. Travenol also argues that MSES disclaimed certainty at trial that its data was complete. Such wavering as the witnesses displayed, however, hardly warrants discarding their evidence altogether.

Second, Travenol asserts that many of the people who MSES referred to Travenol Laboratories may never have shown up for an interview. Thus, a comparison of referred applicants to actual hires omits an important variable: how many applicants Travenol failed to interview because they did not show up. Theoretically, this point is well taken, but its major premise is wholly speculative. Contrary to Travenol's assertion, the MSES witness did not testify that "[f]ailure to report [for an interview] was common." Rather, the witness stated that MSES records failed to indicate which applicants referred for an interview actually showed up and which did not. The following colloquy then took place between the MSES witness and Travenol's counsel.

> Q: Okay. But based on your experience the probability is that there are some who were referred and did not report, is that correct?
>
> A: Probably. I would suspect that most of these reported, but some may not have.

Thus, instead of supporting Travenol's argument, the record indicates that there was no evidence how many applicants did not keep their interview dates, and the witness in the best position to estimate believed that most applicants did show up for interviews. Travenol also departs from the record when it

asserts that the MSES witness testified that the MSES did not always keep records of hires. In fact, the testimony reveals that the opposite is true.

Travenol next objects to the applicant flow data from 1971 to 1974. Travenol's leading attack is that the figures are marred by duplicate applications. Rebecca Allen, the secretary for Travenol's personnel director, testified that approximately 25% of the applications in the applicant flow charts were duplicates. Relying on *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 658 (5th Cir. 1976), Travenol contends that this level of duplicates precludes the use of applicant flow statistics.

This contention, however, is too broad. First, *Robinson* reached the conclusion that applicant-flow statistics were inadequate on the basis of testimony not only that duplicates existed but also that some applicants filled out three or four applications a month. This degree of repetition might well render applicant-flow statistics suspect. Rebecca Allen's estimate that approximately 25% of the applications were duplicates, however, does not. Her earlier testimony established that only when an application expired did an applicant have to fill out a new application; otherwise the old application was renewed.[35] Second, and more important, Rebecca Allen specifically testified that she did not know whether black duplicates exceeded white duplicates. Thus, there was no testimony that black duplicates occurred at a greater rate than white duplicates, and we are unwilling to make such an assumption without evidence in the record to support it. Therefore, Rebecca Allen's estimate of duplicates is not enough to render the applicant flow statistics incompetent.[36]

Travenol also contends that comparisons between black and white rates of hire are not relevant because they fail to isolate class members: black females. Travenol relies on *Jefferies v. Harris County Community Action Association*, 615

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[35] Applications remained current for ninety days in 1974 and later years. Before 1974, applications were considered current for thirty days.

[36] Even if we assume that 25% of the applications were duplicates, Travenol still hired 59.8% of the white applications while hiring only 33.3% of the black applicants between 1970 and 1974.

F.2d 1025 (5th Cir. 1980). *Jefferies* does not support this contention. In *Jefferies* we held that a black female plaintiff is entitled to prove that she suffered discrimination as a black female, even if the employer did not discriminate against either blacks as a class or females as a class. *Id.* at 1032. We did not imply, however, that a black female may not claim and prove that her employer discriminated against her solely because of her race or sex. In fact, the *Jefferies* court addressed the plaintiff's claim that she had suffered separate racial and sexual discrimination. Thus, Travenol's objection to Payne's racial statistics is unsound. While Payne's statistics are not perfect, we find that they clearly suffice to support the district court's findings of a disparate result.

We note, however, two areas that the district court must address on remand. First, Payne argues that Travenol discriminated from 1966 to 1969, relying for statistical evidence of applicant flow solely on an affirmative action plan prepared by Travenol. The district court apparently never ruled on the admissibility of this plan, which Travenol claims is privileged. On remand, the district court must rule on the admissibility of the plan and must make findings of fact and conclusions of law on Travenol's hiring practices between 1966 and 1969. Second, the district court awarded constructive seniority relief to all black females who applied to Travenol before February 19, 1976, but made no findings that support a conclusion that discrimination continued beyond 1974. In the absence of findings covering this two year hiatus, we cannot decide whether such relief was warranted. We therefore must remand to allow the district court to prepare findings to explain its award, or to modify the decree. See *Falcon v. General Telephone Company of the Southwest, supra*, 626 F.2d at 381-82.

Travenol argues that it rebutted the plaintiff's evidence of discrimination and the district court erred in refusing to accept the rebuttal evidence. We have interpreted *Teamsters'* view of rebuttal evidence to mean that:

> [O]nce the plaintiff has offered some evidence of disparity, it is then the defendant's burden to come up with more specific statistical evidence to rebut the plaintiff's proof.

Falcon v. General Telephone Company of the Southwest, 626 F.2d at 301. Travenol offered two statistical alternatives in rebuttal, but the district court was not persuaded. We find that the district court's rejection of Travenol's evidence was not clearly erroneous.

First, Travenol presented statistics that it hired equal proportions of blacks and whites among applicants with their own means of transportation.[37] The difficulty with these statistics is that Travenol's interviewers did not always ask applicants about their own means of transportation, particularly if the applicant received a low interview rating. Thus, Travenol cannot show that applicants it screened out in the interview lacked transportation. Moreover, the sample from which the defendant drew its conclusions excluded one-fourth of all applications for the time it covered. The defendant's witness could not testify that the missing applications were removed randomly. Hence, a large number of applications were excluded from the defendant's study without any showing that statistics about the remaining applications reflected the entire applicant pool. These weaknesses detract significantly from the value of the defendant's showing.

Second, Travenol contends that its hiring of blacks equaled or exceeded the percentage of blacks among qualified persons in the population. Those population figures, according to Travenol, rebut the showing of disparate result in applicant flow statistics. We have held that an employer may repel a finding of discrimination by showing that the proportion of minorities in its work force equals or exceeds the proportion of minorities among the qualified population. *Robinson v. Union Carbide Corp., supra,* 538 F.2d at 658. *Robinson* compared general population figures to work force figures, however, only after concluding that the plaintiff's applicant flow statistics were flawed by excessive duplicates. *Id.* Here, by contrast, we have concluded that the plaintiff's applicant flow statistics survive the employer's attack on their validity. Applicant flow figures are more revealing of an employer's hiring practices than general

[37] Travenol also removed duplicate applications in computing these proportions.

population comparisons when, as here, a greater percentage of qualified blacks apply for work than qualified whites. Travenol has an obligation not to discriminate illegally among applicants who present themselves for work. Because of the heavy minority applicant flow, Travenol cannot show that it discharged this obligation by presenting evidence that the composition of its work force mirrored that of the qualified general population.

Travenol's final line of defense against a finding of discrimination is to argue that interviewing was necessary to select alert, capable workers for its plant. Travenol produces and packages drugs, largely intravenous solutions. There is, therefore, obvious danger to human life if the drugs are contaminated or improperly labeled. Travenol argues that only through subjective interviewing could it secure qualified workers. We recognize Travenol's interest in minimizing the risk of hiring careless employees. But to recognize this interest is not to sanction the discriminatory practices demonstrated by the plaintiffs' evidence.

We have repeatedly held that "hiring procedures [that] rely heavily on the subjective judgments of its executives from personal interviews [create] a procedure that can easily be used to mask racially motivated hiring decisions." *Phillips v. Joint Legislative Committee, supra,* 637 F.2d at 1026. This is particularly true when an all-white supervisory staff conducts the interviews, *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 240 (5th Cir. 1974); *Rowe v. General Motors Corp.,* 457 F.2d 348, 359 (5th Cir. 1972). Travenol's occasional consultation of a black employee does not alter the control exercised by the white personnel staff. Travenol's assertion that interviewing was necessary amounts to no more than a claim that Travenol used interviewing to select only the best applicants. The Supreme Court rejected such a defense in *Teamsters,* and we similarly reject it here. Except as noted, we affirm the district court's award of relief for discrimination in hiring.

B. Discrimination in Initial Assignments

We now address the claim that Travenol discriminated in the initial assignment of those hired. Payne argues that the

district court erred in denying injunctive relief against the disproportionate assignment of blacks to custodial jobs. The district court's 1976 opinion makes no findings or conclusions on discrimination in this area. The magistrate's 1980 report and recommendation for further relief rejected Payne's request, finding no statistical foundation for it, and the district court adopted the report as its own opinion. We agree that the plaintiffs' evidence is not sufficient.

The magistrate noted that as of November 30, 1979, blacks composed 61.9% of all operatives and 70.8% of all custodians. Believing this disparity to be insignificant, the magistrate denied injunctive relief. We do not hold that an 8.9% disparity is necessarily insignificant. We agree, however, that the disparity between the percentage of minorities in Travenol's operative work force and the percentage in its custodial work force does not make out a prima facie case. While a concentration of minorities in the lower echelons of an organization ordinarily is probative of discrimination, here there is no showing that those assigned to the custodial work force had a tenth grade education, and were thus qualifed for operative work when that requirement was in effect. Moreover, the disparity between the percentage of blacks in operative work and in custodial work has been steadily narrowing.[38] We are therefore unable to draw conclusions on Travenol's assignment policies from bare work force statistics.

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[38] The plaintiffs prepared the following chart from Travenol's EEO-1 reports:

Date of EEO-1 Report	Job Categories	Number of Employees	Number of Black Employees	% Black
November 30, 1977	Operatives	1,532	880	57.4%
	Service Workers	87	67	77.0%
November 30, 1978	Operatives	1,097	658	60.0%
	Service Workers	63	48	76.2%
November 30, 1979	Operatives	1,109	687	61.9%
	Service Workers	65	46	70.8%

The only other statistics cited by plaintiffs show that between 1967 and 1974 Travenol assigned 6.8 of the blacks hired for entry level work to custodial jobs, while assigning only 0.7% of the whites to custodial jobs. These figures are suggestive but do not persuade us that Travenol discriminated in initial assignments of custodial workers. First, the sample is very small; Travenol averaged seven assignments to custodial work each year during the period covered by these statistics. Second, the plaintiffs admit that half of the blacks assigned to custodial work lacked a tenth-grade education and, therefore, were not eligible for operative positions. These factors considerably erode the strength of the plaintiffs' proof on this point and the district court did not err in refusing to grant injunctive relief.

C. Discrimination in Promotions

In this section we address Payne's contention that Travenol structured its procedure for advancing from assembler to material handler in a fashion that discriminated against females, and her contention that black females suffered discrimination in promotions above the operative level.

1. The "Hooks" Position

Payne claims that female assemblers were impeded from entry into the material handler work force by the defendant's use of the "hooks" position as the entry job. At the time of the trial in 1976, Travenol had a material handler position that required lifting many bottles on and off the production line with plastic devices called "hooks." The "hooks" enabled a user to lift more bottles at a time than could be lifted by hand. The hooks position was arduous; it demanded more sustained heavy lifting than any other material handler slot. When filling material handler vacancies other than the hooks, Travenol gave priority to hooks bidders even though any operative employee could bid for the position. Since hooks workers rarely declined the opportunity to transfer, "[t]his right of first refusal ha[d] the effect of transforming any material handler vacancy into a vacancy on the 'hooks' jobs." 416 F.Supp. at 262. The district court also found that females were deterred from applying for material handler positions, and those who did were forced by

the hooks position to retreat back to assembler jobs much more often than men. The court therefore concluded that the use of the hooks position as the entry into material handling unlawfully discriminated against females.

In response to a Food and Drug Administration investigation in 1975 Travenol abolished the hooks position and replaced it with the "bottle stack on, bottle stack off" position. The "bottle stack" position also involves putting bottles on the line and taking them off, but is less physically taxing than the former hooks position. Travenol also ceased to give bottle stackers priority in bidding for other material handler positions. Travenol denies that the hooks position did discriminate against women, and maintains that in any event the new bottle stack position is not sexually discriminatory. We affirm the district court's conclusion that the hooks position discriminated against females, but agree with Travenol that its modifications of this position remove its discriminatory character.[39]

The plaintiffs presented statistics that more females leave the bottle stack position than men. The plaintiffs also presented testimony of two females who were loath to accept bottle stack positions because they require much more physical effort than other material handler positions. While this evidence indicates that bottle stacking is still undesirable, we have no warrant for overturning the magistrate's judgment, approved by the district court, that no injunctive relief against it is warranted. Because females no longer must become bottle stackers in order to ascend to other material handler positions, the discriminatory effect created by the hooks position is not present.

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[39] The impact of the "hooks" on women was particularly severe because until 1968, Travenol had steered women into the lower paying job of assembler and men into the higher paying job of material handler. The overt sex requirements were dropped in 1968, but the impressions left in the minds of applicants resulted in no males applying for the assembler job and no females applying for the material handler job until 1971. By 1974 there were 630 female and two male assemblers, and 226 male material handlers but only seven female material handlers.

2. Promotions Above the Operative Level

The district court found Travenol guilty of a variety of discriminatory promotion practices, and the decree we review today contains provisions designed to enjoin this discrimination. Travenol argues that the evidence failed to establish the existence of racial discrimination in promotions, and, therefore, the relief directed to this issue should be struck down.

The district court relied on two major categories of evidence in concluding that Travenol discriminated in promotions. First, the district court cited statistics that leave no doubt that Travenol's work force above the operative level was virtually all white through 1974.[40] Second, the district court examined Travenol's promotion procedures and found them marred by the same opportunity for subjective discrimination that existed in the hiring process. Travenol attacks both findings on appeal.

Travenol argues that work force statistics are not properly considered in assessing discrimination in promotions because we determined in *Payne* I that many positions above the operative level were filled in part by lateral hiring. 565 F.2d at 895. In *Payne* I, we held that the district court did not err in measuring the disparate impact of Travenol's twelfth-grade requirement for positions above the operative level by reference to general population figures. We noted, however, that the "the large majority of the employees occupying positions subject to the twelfth grade requirement were promoted from operative

[40] More recent statistics also reveal a concentration of blacks in the lower paid positions in Travenol's plant. While whites constituted 38.1% of the operative work force in 1979, the following statistics show their proportions in other positions in the plant:

	August 1979	
Job Level	No.	% White
Officials & Managers	66	83.5%
Professionals	26	72.2%
Technicians	17	70.8%
Office & Clerical	44	77.2%
Craftsmen	122	68.2%

jobs . . . . " *Id.* Thus, it is plain that work-force statistics are relevant to the impact of Travenol's promotion procedures. *See Johnson v. Uncle Ben's, Inc., supra,* 628 F.2d at 425 (when positions are filled both by lateral hiring and by promotion, "[a]s a general matter . . . cases are dealt with in terms of the extreme [exclusive promotion or exclusive lateral hiring] to which they most closely accord").

Travenol also attempts to rebut the work-force figures by presenting statistics on actual promotions. Travenol's evidence is that 23.2% of all promotions between 1970 and 1974 went to blacks, and during this period blacks averaged 29.9% of all operatives. The district court apparently rejected these rebuttal statistics, and the record supports this evidentiary choice. The testimony of the defendant's witness shows that the charts from which Travenol drew its statistics are flawed by a failure clearly to categorize the positions filled through promotions, and by omissions in entries. These errors detract from the force of the defendant's proof, and the district court's decision to reject it is not clearly erroneous.

Travenol next argues that the process through which it selected operatives for promotions was free from bias. The district court's finding that Travenol did not have the opportunity to discriminate in promotions, however, is well supported by the evidence and by our cases. The district court found that Travenol's failure to post notice of openings, and its reliance on the recommendations of supervisors, the length of an employee's service, and educational requirements in making promotion decisions all operated discriminatorily. We affirmed the district court's conclusion that the educational requirements were discriminatory in *Payne* I, and we do not further address them here.

Travenol argues that the failure to post notice of job vacancies is irrelevant because it did not consider requests for promotions to supervisory positions, and did not require applications for promotions to office, clerical or technical positions. The district court concluded, however, that job vacancy exposure was greater among whites than blacks. Even if applications were not required for certain positions, when most of

the supervisors are white, failure to post job vacancies can only discourage applications by blacks to a greater degree than it discourages whites, who garner information through the grapevine. *See e.g. Long v. Sapp*, 502 F.2d 34, 41 (5th Cir. 1974).

The district court found that a major factor in promotions, the supervisor's recommendation, was delivered without guidance by any objective standards and operated to discriminate. "This court has recognized that promotion systems utilizing subjective evaluations by all white supervisors provide a ready mechanism for discrimination." *Fisher v. Proctor & Gamble Manufacturing Co.*, 613 F.2d 527, 544 (5th Cir. 1980); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977). We uphold this finding of the district court.

The district court also found that Travenol's consideration of length of service as a criterion for advancement tended to perpetuate past discrimination in the hiring of operatives. Travenol argues that under the Supreme Court's decision in *Teamsters, supra*, the district court improperly premised Title VII liability on the length-of-service factor. *Teamsters* holds that a bona fide seniority system does not violate Title VII merely because it perpetuates the effects of discrimination before the enactment of Title VII. 433 U.S. at 352-54, 97 S.Ct. at 1863-64. We see no application of *Teamsters* to the instant case. Travenol's informal and erratic reliance on length of service falls far short of being a bona fide seniority system under the statute and under *Teamsters*.

The district court's finding of discrimination in promotions must be affirmed.

D. Discrimination in Merit System Pay

For professional, technical, clerical, and supervisory positions, Travenol determines salary subjectively according to its merit pay system. Payne argued below that Travenol discriminated against both blacks and women in setting merit pay salaries. The district court did not address this point in its 1976 opinion, but implicitly rejected the plaintiffs' claim when declining to accept proposed findings of fact and conclusions of law

with respect to it in 1976. Payne now asks us to reverse the district court's implicit exoneration of Travenol on the merit pay issue.

Ordinarily we would be reluctant to decide an issue on which the district court was silent. In this instance, however, we affirm the district court's refusal to find discrimination in merit pay. Payne has called no statistics to our attention upon which a finding of discrimination can be based. Payne compares several sets of statistics that show disparities between the pay of blacks and whites or between males and females. Each comparison, however, looks at groups that differ in significant ways in addition to race or sex. For instance, Payne asserts that among employees with a twelfth-grade education, white males make $2,757.11 per year more than black females. Payne does not tell us, however, how many years the white males have worked compared to the black females. Nor does she compare white males to black females who occupy the same job category. Yet length of service and job category could clearly account for the pay differential without regard to race or sex. Finally, the comparison of black females and white males includes all job categories at the plant, not only merit pay jobs. The average salary of all jobs tells us little about inequities, if they exist, in merit pay jobs.

Similar criticisms can be leveled at every example of disparities in merit pay that Payne alleges.[41] We need not

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[41] Without reviewing in detail here all of Payne's exhibits, we make the following observations on her statistics. Payne states in her brief that "black female Craftsmen were paid an average of almost $600 a year less than white female Craftsmen, and white female Craftsmen were paid an average of $1324 less than white male Craftsmen." Looking at the exhibits, we are unable to tell how long any of the craftsmen have been working, a fact that is certainly relevant to their salaries. Moreover, we note that there is only one black female craftsman on the exhibit. We recognize that Travenol's discriminatory promotion policies account for the paucity of black females in merit pay jobs. But the small number of them—one in the category of craftsmen—makes it difficult to prove disparities in pay statistically.

Payne also relies on exhibits for proof of patterns of disparate merit pay. These exhibits show the date of hire, date of hire for the merit pay job, and the sex, race, and salary of each employee in a merit system job category

(footnote continues)

engage in a sophisticated analysis to conclude that Payne has failed to isolate the influence of sex or race on merit pay at Travenol. Thus, the showing is insufficient to entitle her to relief and we affirm the district court's denial of it.

III. CHALLENGES TO THE RELIEF ORDERED

Payne raises a number of challenges to the relief ordered in the decree. We have considered each of these objections and conclude that in most aspects, the district court did not abuse its discretion in shaping relief. Two objections with respect to constructive seniority, however, have merit.

Paragraph 10(a) of the decree provides that notice shall be given to each black woman currently working in an hourly job at Travenol "who applied for employment prior to February 19, 1976, and was not hired by that date."[42] Payne correctly urges that a class member whose date of hire was delayed by discrimination but who was eventually hired before February

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(footnote continued)

during 1973 and 1974. All but two job categories contain no black females. In one category, inventory clerk, the sole black female is paid *more* than the average white female; no males are employed as inventory clerks. In the other category, accounting clerks, the sole black female makes twenty two cents an hour less than the average hourly amount made by white females; again, no males held this job. Our review of the chart reveals that only one white female with less seniority than the black female made more than the black female did. The figures for 1974 are more equivocal. In that year, white females received an average raise of thirty five cents an hour; the black female's raise was only fifteen cents per hour. While this fact is suggestive, it is too slender to support a condemnation of an entire system of setting salaries.

[42] We recognize that February 19, 1976 is used in the decree because the district court found that discrimination had ended by the date it rendered its decision on liability. We hold in II.A, *supra*, that the district court did not make findings that support a conclusion of discrimination in hiring beyond 1974. We therefore are remanding to permit the district court to make findings that underpin its conclusion that discrimination continued until 1976, or to modify its conclusion. The decree, of course, must reflect any alteration that the district court makes in the ending date for discrimination at Travenol. We use February 19, 1976 in this opinion as a proxy for the date eventually selected by the district court.

19, 1976, is also entitled to constructive seniority. The decree must allow a black female operative who applied to Travenol during the time that unlawful employment practices prevailed at Travenol's plant to make a prima facie showing that she would have been hired earlier but for discrimination, even if she was in fact hired before the date when Travenol ceased to violate Title VII. Such a showing is made if the time between her application and date of hire is longer than the average waiting time for white applicants who applied the same time she did.

Paragraph 11 of the decree provides that employees laid off and awaiting recall shall be recalled by seniority date, whether actual or constructive.[43] The use of constructive seniority, we find, must go further than the decree provides to afford a complete remedy. Under the decree an employee with normal seniority could fare better than a class member with equal constructive seniority if the employee with normal seniority has already been recalled after a layoff while the employee with constructive seniority still awaits recall.[44] In fact, an employee with normal seniority may have escaped lay off altogether while a class member with less normal seniority (because of a discriminatory delay in hire) but equal constructive seniority has been laid off. The decree fails to make whole a class

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[43] The decree provides:

> Any class member who is entitled to constructive seniority under the provisions of paragraph 10 as a result of discriminatory delay in her hire, and who has been laid off and not been recalled as of the effective date of this Decree, shall be recalled in accordance with her constructive seniority date and the plant or constructive seniority dates of the other employees laid off. The employees whose seniority is to be compared are the employees in competition for recall with the class members in question.

[44] The following hypothetical situation illustrates this point: A white female and a black female applied to Travenol in 1970, and the white female was hired immediately but the black female was not hired until 1976. Both were then laid off in 1976. Travenol recalled employees in 1977 in order of seniority, and, because of her greater seniority, the white female was recalled but not the black. In 1980, the black female was awarded a constructive seniority date of 1970. Because the black female should have been recalled in 1977, had she not suffered a discriminatory delay in hire, she would be entitled to compensation for the time she awaited recall.

member in either situation. The decree therefore must be modified on remand to allow a class member in either position to be compensated for lost earnings.

Travenol also challenges two paragraphs of the decree as to the nature of the relief granted. Paragraph 10(b) provides for the establishment of the constructive seniority date of an employee class member who claims that her date of hire was discriminatorily delayed beyond February 19, 1976. Travenol argues that paragraph 10 denies it the right to contest a constructive seniority date by proving that the delay in hire was not discriminatory.

The parties agree that an employer must have the right to prove that an employee is not entitled to constructive seniority because her delay in hire was not caused by discrimination; they disagree whether Paragraph 10 affords Travenol that right. The decree now establishes a means of calculating the presumptive constructive seniority date, then allows Travenol to suggest an alternative date. To remove any ambiguity, the district court on remand should modify paragraph 10 to provide explicitly that Travenol may dispute a class member's entitlement to any constructive seniority at all as well as to suggest a date different from the presumptive date.

Paragraph 8 provides that Travenol must write to all unhired members of the plaintiff class of whom they know, invite them to reapply for a position, and give them priority over other applicants. Travenol contends that Paragraph 8 gives priority to all applicants, even those rejected for nondiscriminatory reasons, and, therefore, grants the plaintiff class greater relief than it deserves. Travenol also argues that not all victims of discrimination should be given hiring priority because Travenol could not have hired all of them even if it hired only black females. Travenol must be afforded the right to contest priority by arguing that an applicant was rejected for legitimate reasons. In such disputes each applicant class member is entitled to a presumption that she would have been hired but for discrimination. The burden will be on Travenol to prove that it rejected her for legitimate nondiscriminatory reasons. *See Teamsters, supra,* 431 U.S. at 360-62, 97 S.Ct. at 1867-68.

Travenol's additional objection to paragraph 8, that it grants priority to too many applicants-discriminatees, is premature. The Supreme Court noted in *Teamsters* that "after the victims have been identified and their rightful place determined, the district court will again be faced with the delicate task of adjusting the remedial interest of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." 431 U.S. at 372, 97 S.Ct. at 1873. The district court here will be faced with the delicate task of determining to what extent the applicant class members will be entitled to priority over innocent current applicants.

Before the district court balances these interests, the number of applicant class members who now seek work at Travenol must be determined. It is not for us to place a ceiling on applicant class members entitled to priority. The district court must exercise its discretion in this matter after the facts have been developed more fully. We note only that the number of applicants entitled to priority need not correspond exactly to the number of black females that Travenol would have hired absent discrimination.

IV. ATTORNEY'S FEES

Payne requests that we direct an award of interim attorney's fees. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358-59 (5th Cir. 1977). The record reveals that the district court entered an interim fee award on December 8, 1976. This order is not now before us. Requests for further interim attorney's fees should be addressed in the first instance to the district court.

V. CONCLUSION

In summary, we hold:

I. Our jurisdiction to review this Title VII interlocutory decree includes the power to review limitations on the scope of the class when those limits have been the basis for granting or withholding injunctive relief.

II. The district court did not abuse its discretion in redefining the class to exclude black males once the sole black male plaintiff dropped out of the case, nor was it obligated to give black males notice of the redefinition.

III. The district court erred in setting the opening date of the class. For the Title VII race and sex claims, the class should open on October 21, 1969 except as to any claims based upon the tenth-grade education requirement. For Section 1981, the class may open on March 2, 1966, if the district court finds racial discrimination going back to that date.

IV. We affirm the findings of discrimination: (a) in the hiring of black women, and (b) in promotions, to the extent that these findings support challenged portions of the decree.

V. We remand for the district court to prepare findings and conclusions on discrimination in hiring on a racial basis from 1966 to 1969 and from 1975 to February 19, 1976 on the basis of race or sex.

VI. We affirm the denial of injunctive relief against discrimination: (a) in the initial assignment of custodians, (b) in the "bottle stack on, bottle stack off" position, and (c) in the merit pay system.

VII. We affirm the other parts of the decree, except in four particulars. First, paragraph 10(a) must provide for an opportunity for black females who were hired before Travenol ceased to discriminate, but whose date of hire was discriminatorily delayed, to claim constructive seniority. Second, paragraph 11 must be modified to compensate class members for lost earnings when layoffs have fallen more heavily on them than on employees who were not the subject of discrimination by Travenol. Third, paragraph 8 must be modified to allow Travenol to prove that applicant class members were rejected for legitimate reasons. Finally, paragraph 10(b) must be modified to allow Travenol to prove that an operative class member's date of hire was not delayed because of discrimination.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOLDBERG, Circuit Judge, concurring in part and dissenting in part:

I am in complete agreement with much of my brethrens' thorough, scholarly, and meticulous opinion. The Majority has resolved many of the complex legal and factual problems presented by this protracted litigation, setting the stage at long last for a final resolution of the parties' claims. However, one aspect of the Majority's Opinion compels my dissent. The Majority has affirmed the district court's decision to exclude black males from the plaintiff class,[1] without however, permitting notice of their exclusion and in spite of a finding that black males had been the victims of unlawful discrimination. I believe that on this record, denial of relief to black males is fundamentally unfair and erroneous as a matter of law. Therefore, I must respectfully dissent.

I. PROCEDURAL HISTORY

A. *Proceedings in the District Court:*

This class action was initially brought by three named plaintiffs, (two black females and one black male) on behalf of the black employees and job applicants at Travenol Laboratories. Plaintiffs alleged that the defendant corporation's employment practices were racially discriminatory and violative of Title VII.

On November 16, 1972, the trial court conditionally certified and defined the plaintiff class to include all black Travenol employees and job applicants. On May 1, 1973, Willie Mae Payne, a black female and a class representative, amended her complaint to include charges of gender based discrimination in addition to her original claim of racial discrimination. The following week, James Williams, the sole male class representative, chose to withdraw from the case, citing "religious views."

[1] Section IIB of the Majority's Opinion, *ante* at 809, discusses the exclusion of black males from the plaintiff class.

With the addition of the sex discrimination claim, and with the sole male class representative out of the case, defendant Travenol moved that the plaintiff class be narrowed to include only black females. This district court was of the opinion that a conflict between the objectives of black males and black females might develop in the litigation and that therefore black females could not adequately represent black males. Accordingly, on December 20, 1974, the trial court conditionally granted defendant's motion and excluded black males from the plaintiff class. However, no notice was ever sent to inform the black male class members that their named representative had left the case and that henceforth they would be excluded from the action.

The case went forward to a trial on the merits, with the plaintiff class certified to include only black women. Following a trial on the issue of liability, the district court made findings of fact and conclusions of law. The trial court found, *inter alia,* that Travenol had been guilty of both gender and race discrimination in hiring and promotion. Based on the evidence introduced at trial, the district court found that black females *and black males* had been the victims of unlawful discrimination.

Following the trial, counsel for plaintiffs renewed their request that the plaintiff class be broadened to once again include black males. However, in an order issued December 8, 1976, the trial court reaffirmed its earlier ruling on class certification. Citing the supposed conflict between the interests of black males and females, the district court persisted in its ruling that black females could not adequately represent a class which included black males.[2] Finally, on January 24, 1979, the district court entered an order once more declining to make any change in the plaintiff class.

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[2] This ruling was certified for interlocutory review pursuant to 28 U.S.C. § 1292(b). However, the Fifth Circuit, by order of February 23, 1977, denied the petition for permission to appeal from the district court's order of December 8, 1976.

B. *Plaintiff's Arguments on Appeal:*

Plaintiffs now appeal from the district court's ruling regarding the scope of the plaintiff class. Plaintiffs argue: (1) that the trial court initially erred in refusing to allow a black female to represent black males in this class action; (2) that insofar as the black female class representatives successfully established that Travenol had discriminated against both black females and males, the trial court erred in its post-trial rulings denying relief to black males; and (3) that in any event the trial court erred in refusing to notify absent black male class members that their sole representative had withdrawn from the suit and that henceforth they would be excluded from the action.

C. *The Majority Opinion:*

The Majority holds that the district court did not abuse its discretion in making its pretrial decision to exclude black males from the plaintiff class. The Majority also holds that the district court was not required to inform absent class members that their sole representative had withdrawn from the action and that henceforth they would be excluded from the case.

D. *This Dissent:*

As I have stated at the outset, I enthusiastically concur with much of the Majority's careful and thoughtful decision. Thus, it is only with great hesitation that I must register my disagreement with one part of this otherwise exemplary opinion. I believe the district court committed two analytically distinct errors in excluding black males from the plaintiff class. First, the district court should not have excluded black men from a class represented by black women on the grounds of a potential conflict of interest which in fact never materialized. Second, even if the district court was correct in its theory that black women could not represent black men, the district court erred in failing to inform the absent class members that their sole representative had withdrawn from the suit and they would be excluded from the action.

Each of these errors, standing alone, mandates that the district court's decision on exclusion of black males be reversed and remanded with instructions to rectify these mistakes.

II. EXCLUSION OF BLACK MALES FROM THE PLAINTIFF CLASS: ANOTHER VIEW

A. *The Pretrial Ruling:*

The Majority Opinion focuses upon the district court's pretrial decision to exclude black men from the plaintiff class. The Majority treats this decision as one within the trial court's "discretion" and concludes that the district court did not abuse its discretion in excluding black males. I do not believe that the district court's ruling should be examined under the "abuse of discretion" standard of review. It is true that "[w]hen based upon facts aduced at an evidentiary hearing," a district court's decision as to the scope of a class is reviewable only for abuse of discretion. *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 559 (5th Cir. 1981). However, class certification decisions made without the benefit of such a factual record are accorded less deference. *See Geurine v. J & W Inv., Inc.*, 544 F.2d 863, 864-865 (5th Cir. 1977); *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975); *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 117 (5th Cir. 1975).

In this case, the district court did not consider any testimony or evidence bearing on the existence of an actual antagonism between male and female class members.[3] Because the trial court did not rely upon live testimony or evidence, we can only assume that the trial court was of the opinion that there was an inherent conflict between the interests of black

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[3] "Rather than determining the question of conflict abstractly, the court must examine the interlacing allegations of race and sex discrimination to determine whether an actual conflict exists." *Ante*, at 811. District courts considering the problem of mixed race and sex discrimination class actions have consistently held that a conflict of interest is not inherent, but is a question of fact to be determined through evidentiary proceedings. *See, e.g., Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420, 434-435 (N.D.Tex., 1979); *Strong v. Arkansas Blue Cross & Blue Shield*, 87 F.R.D. 496 (E.D.Ark. 1980); *Hammonds v. Folger*, 87 F.R.D. 600 (W.D.Miss., 1980); *Edmondson v. Simon*, 86 F.R.D. 375 (N.D.Ill. 1980). No such evidentiary hearing was held in this case. Thus, the factual record was not sufficiently developed to support a finding of an actual conflict which would justify exclusion of black males.

males and females and that a black female could not adequately represent black males during any phase of the trial. I believe that this was a conclusion of law, and is reviewable as such.

The trial court's decision to exclude black men was based on a mere hypothesis that a conflict *might* develop between male and female class members *if* females were allowed to compete with males for the better paying jobs of material handler. This is not a case where the testimony of the named plaintiffs revealed identifiable antagonism toward other class members.[4] Thus, I believe that this is a case of mere possible and *not* actual conflict.

Not only was this a case of mere potential conflict, upon careful examination it is clear that the conflict itself is in large part illusory, since the district court's fear of potential conflict among class members was premised upon an erroneous understanding of Title VII law.

In ruling that black men would be excluded from the plaintiff class, the district court reasoned that plaintiffs would try to prove at trial that women were disproportionally excluded from the better-paying material handler jobs. Therefore, the court concluded, women could not represent any black males . . . "who may have an interest in *retaining* their jobs as material handlers." (Emphasis added) *ante,* at 809, n.8. The trial court apparently assumed that black women plaintiffs would seek to take material handler jobs away from black men who held those positions. This assumption is incorrect. A remedial order could only affect *future* job placements; it could *not* remove incumbent material handlers from their jobs. *See United States v. Hayes International Corporation,* 456 F.2d 112, 118 (5th Cir. 1972); *Local 189, United Papermak. & Paperwork*

[4] *Compare, e.g., Strong v. Arkansas Blue Cross & Blue Shield, Inc.,* 87 F.R.D. 496 (E.D.Ark. 1980) (black female plaintiff's testimony reveals that other female employees were beneficiaries or perpetuators of discrimination); *Hammons v. Folger Coffee, Inc.,* 87 F.R.D. 600 (W.D.Mo.1980) (black female plaintiff's allegations that other female employees were promoted over her reflected actual conflict).

v. U.S., 416 F.2d 980,988-989 (5th Cir. 1969).[5] Thus, there would be no conflict between the interests of black females who might seek future positions as material handlers and that of black males already holding the jobs.

In fact, the only potential conflict I can find in this case is that of competition between black males and females seeking material handler jobs. However, the "conflict" among these class members is indistinguishable from the conflicts inherent in any Title VII class action. Whenever a Title VII plaintiff class prevails, the class members are thrown into competition with one another, as well as with non-class members, for a limited number of jobs. However, as the Majority acknowledges, this Court has consistently rejected the contention that job competition among class members creates a conflict sufficient to defeat class certification under F.R.Civ.P. Rule 23. *See, ante*, at 810, n.10.[6] To hold otherwise would effectively destroy the class action as a procedural device for enforcing Title VII rights,

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[5] In *Local 189, United Papermak. & Paperwork v. U.S., supra*, an early Title VII case, this Court rejected plaintiffs' argument that blacks should displace white incumbents who held jobs to which blacks were entitled. The Court adopted instead the "rightful place" remedial theory. "The 'rightful place' doctrine requires that qualified blacks be given a preference for future vacancies in positions they would have occupied but for wrongful discrimination." *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 356 (5th Cir. 1977).

[6] Competition between employees and applicants for jobs is only one form of conflict which may arise in a Title VII class action. There are numerous other examples of divergent interests among class members at the relief stage of Title VII litigation. For instance, class members are likely to disagree about the formula chosen for computing back pay, since one method may favor less skilled workers over highly skilled workers; while another method could disadvantage formerly employed class members at the expense of current class members. *See* Crowley, "Due Process Rights of Absentees in Title VII Class Actions--The Myth of Homogeneity of Interest," 59 B.U.L. Rev. 661, 664—666 (1979). Different techniques for calculating retroactive seniority, and for restructuring defendants' lines of progression may also become the basis for conflict among class members. Crowley, *supra* at 666-668. Nevertheless, these types of conflicts among class members, indistinguishable from the "conflict" in this case, are not seen as grounds for decertifying class actions.

for it is impossible to imagine a Title VII class action that does *not* involve a potential conflict among class members at the relief stage of the litigation.[7]

The inevitability of conflict among Title VII class members over forms of relief should not be a cause for alarm. Rather than dictating the downfall of class actions, such conflict has given rise to the bifurcated Title VII suit. In a bifurcated Title VII action, such as the instant case, there is a trial phase followed by a remedial phase. At the trial stage, the defendant's liability to the class as a whole is adjudicated by the class representative. At the remedial stage, the class members' claims for back pay, constructive seniority, and preferential hiring are resolved on an individual basis. As Judge Medina explained in that granddaddy of all class actions, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 556 (2d Cir. 1968):

> "Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule [Rule 23] gives a court the power to divide the class into appropriate subclasses or to require the members to bring individual suits for damages."

Competition among class members for limited jobs will not affect the adequacy of representation at the initial liability stage of the trial, since the class representative is concerned with establishing a general right to relief on behalf of all class members. Once the class representative proves that defendant's practices violated Title VII, each individual class member may come forward to establish his or her right to back pay,

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[7] Under the reasoning set forth by the district court and endorsed by the majority, Willie Mae Payne was not even an adequate class representative of other black *females* in this action. Now that she has prevailed on the merits of her sex discrimination claim, Ms. Payne will be placed in competition with other black women class members for a limited number of material handler positions. Under the majority's reasoning, competition between class members at the relief stage of the litigation would create a conflict of interest warranting the exclusion of any black female who might be interested in applying for a material handler position. Accordingly, the class would have to be decertified. Yet despite this manifest "conflict of interest," Ms. Payne was found to be an adequate representative of the plaintiff class.

constructive seniority or preferential hiring. Conflicting interests among class members, i.e. competition for the same job, are taken into account in formulating relief. Thus, competition among class members can be handled on a case-by-case basis. In a bifurcated Title VII suit, such competition at the relief stage need not detract from the named plaintiff's ability to adequately represent all class members at the liability stage.

In fact, it is *only* through the procedural device of a class action that the competing claims of Title VII plaintiffs can be equitably resolved. The very purpose of a class action is to gather before the court all parties entitled to relief. When all are assembled, the court can distribute relief fairly among the class members rather than awarding relief to any one plaintiff at the expense of other similarly injured individuals. *See* "Developments in the Law—Class Actions," 89 Harv.L.Rev. 1318, 1366-1367 (1976) (discussing the "limited fund" theory of class actions).

As will be discussed more fully *infra*, the district court in this case specifically found that black males, as well as females, were the victims of unlawful discrimination. However, as a consequence of the Majority's decision, the Magistrate is now actually forbidden to consider the interests of black men in designing those portions of his proposed order which deal with individualized relief.[8] Because all the parties entitled to relief were not gathered together in this one action, the trial court is now unable to equitably distribute the limited available relief in the remedial phase of the litigation.[9]

Finally, the Majority justifies the exclusion of black males from the class as necessary to vindicate the black males' right to

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[8] In this Report and Recommendation, the Magistrate notes that he is bound by the court's definition of the plaintiff class in awarding individualized relief.

[9] *See generally*, Developments, *supra* at 1476-1477. (Exclusion of class members with conflicting interests should be regarded as a technique of last resort, since a better result is reached when the outcome of adjudication is reflective of all relevant legal interests, rather than just the interests of the named plaintiffs.)

be represented with "undivided loyalty" by "a class representative who is free from a desire to prove a claim that will impair their interests." *Ante* at 811.

The Platonic ideal of adequate representation is realized when one attorney zealously represents the individual interest of one client. Every class action is necessarily a departure from this ideal. In a class action, attorneys advocate several interests which are common to all class members. Therefore, no one class member's interests are ever represented with "undivided loyalty": counsel's loyalty is necessarily owed to the goals shared by the class as a whole.

Under this system of advocacy, there is always the danger that a class attorney will not urge all class members' interests with equal vigor. This possibility exists even in the most homogeneous of classes. For instance, as a matter of trial strategy, an attorney may choose to press the claims which are easiest or least expensive to prove, ignoring others.[10] Or, an attorney may advocate the named plaintiff's interests more strongly than the interests of absentees.[11] However, the ever-present possibility of less than vigorous representation of some class members' claims has not necessitated abandonment of the class action as a procedural device for vindicating rights. Instead, the trial judge presiding over a class action is charged with the duty to protect the interests of absentees by monitoring the adequacy with which their interests are represented throughout the litigation. If at trial the class attorney does not fulfill his or her duty to adequately represent all class interests, the trial court may at that time decertify the class. *Ante* at 811.

In this case, plaintiff's attorneys sought to prove both race and sex discrimination. Of course, there was a possibility that counsel might concentrate on proving sex discrimination, leaving the class members' race discrimination claims to languish unproven. In that event, it would be the trial court's duty to decertify the class, so that black men would not be bound by

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[10] *See generally* Crowley, *supra* at 676-677.

[11] *See e.g. Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973) (class attorney failed to appeal award of retrospective relief to named plaintiff only).

the judgment. However, until class counsel actually proved, by their trial performance, that they would not represent both race and sex claims with equal vigor, there was no inherent reason to assume inadequate representation of black males' interests.

Moreover, I fail to see how a black female class representative had any desire to prove a claim that would impair the interests of black males, as the Majority implies. True, female plaintiffs sought to prove that they were denied material handler positions on the basis of their sex.[12] But females also sought to prove that all blacks, male and female, were discriminated against on the basis of race in both hiring and assignments. Even if it were established that black females were doubly disadvantaged on the basis of both race and sex, it would not follow that females were thereby entitled to "double relief." Instead, both black men and women would be entitled to the same relief. Under Title VII, black males and females would have a right to remedies, such as back pay and constructive seniority, sufficient to compensate them for periods of time in which they were denied jobs they would have occupied but for discrimination, either race or gender-based. *See* note 5, *supra*. Surely, female class members are not entitled to more back pay or seniority because defendant discriminated against them on two of the grounds proscribed by Title VII, rather than just one. Therefore, I do not see how females' claims of sex discrimination could impair the interests of black males.

I do not take the position that there could *never* be a case in which proof of some class members' claims might impair the interests of others. When one group of class members seeks relief which is substantively different from that sought by the class representative, the named plaintiff is not an adequate representative for the dissenting group's interests. An example is provided by school desegregation class actions, involving groups of black parents who are opposed to the relief sought by the class representative. While the class representative typically

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[12] Plaintiffs also sought to prove that Travenol discriminated against women by requiring a mandatory six-month pregnancy leave without pay. *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. 248, 263-264. However, proof of this sex discrimination claim obviously could not impair the interests of black males.

seeks desegregation through busing, the dissenting group may oppose busing and advocate instead other court-ordered programs which focus on educational improvement. *See, e.g., Tasby v. Wright,* 520 F.Supp. 683, 732-733 (N.D.Tex.1981). *See generally* Bell, "Serving Two Masters": Integration Ideals and Client Interests in School Desegration Litigation," 85 Yale L.J. 740 (1976). Under these circumstances, dissenting groups should be allowed to intervene in order to urge their separate interests. *See Tasby v. Wright, supra* at 689-90.

The case of *Bailey v. Ryan Stevedoring Co., Inc.,* 528 F.2d 551 (5th Cir. 1976) is illustrative of a fundamental conflict among class members over the relief sought in an action brought to redress Title VII violations. In *Bailey,* three blacks brought a class action seeking *inter alia* an injunction ordering integration of racially segregated local stevedoring unions. 204 of the 280 members of the black union signed a petition stating they did not wish the named plaintiffs to represent them, since the union members did not want to dilute their strength by integrating with a white local. *Bailey v. Ryan Stevedoring Co., Inc., supra* at 553. Accordingly, this Circuit upheld the district court's decision to deny class certification on the grounds that the three named plaintiffs could not adequately represent the [illegible]ority of class members' interests. *Id.*

In this case, there was no such conflict of interest over the fundamental goals of the litigation. Both black men and women sought to establish that defendant Travenol's employment practices violated Title VII. Both black men and women sought injunctive relief prohibiting further illegal practices, as well as individual relief to compensate for past instances of discrimination.

In sum, the district court erred in holding that, as a matter of law, the "inherent" conflicts of interest between black male and female class members rendered the latter inadequate representatives of the former's interests. Conflicts of interest between class members for a limited "fund" of relief are inherent in every Title VII class action. Also inherent in the class action system of advocacy is the possibility that class counsel might not represent all claims with equal vigor. If these

types of conflicts sufficed to defeat class certification, there could be no class actions. However, instead of sounding the death knell for this useful procedural device, the courts have developed new doctrines to protect class members from conflicts which could be inimical to their interests. A duty has devolved upon the trial court to monitor the adequacy with which all class members' interests are represented throughout the trial. If conflicts actually develop, the trial court may create sub-classes, allow intervention, or in extreme cases, decertify the class. But exclusion of black males from the class in this case surely cannot be justified on the basis of the precise type of inter-class conflict which is inherent, but tolerated, in every Title VII class action.

There was no disagreement between black men and women as to the outcome of this case: both groups sought to prove that defendant had discriminated against them in violation of Title VII; and that accordingly, they were entitled to appropriate relief. There was no reason, based on the law in this Circuit, why a black female could not represent all black employees in their mutual jihad against Travenol Laboratories.

B. *The Post-Trial Exclusion of Black Males From the Plaintiff Class:*

The district court justified its pretrial decision to exclude black males from the plaintiff class on the grounds that a conflict of interest *might* develop during litigation. For the reasons I have set forth in Part II A, I believe that this decision was erroneous as a matter of law. However, whatever justification there might be for the pretrial class certification decision, the trial court's post-trial order denying relief to black males cannot be sustained.

In considering the class representatives' claims that defendant Travenol discriminated on the basis of both race and sex, the district court necessarily reviewed evidence bearing on the effect of Travenol's policies on blacks. However, the district court did not confine itself to an examination of evidence bearing upon discrimination against black women. Instead, the court specifically found that Travenol's hiring policies, educational requirements, failure to post job vacancies, and

system of promotion adversely affected *all* blacks.[13] In some cases, the findings were actually broken down to show the specific effect of discriminatory policies on black men.[14] Thus, although black males were excluded by pretrial order from the class of plaintiffs bringing this action, the district court proceeded to try the case and make findings predicated on the assumption that black men were properly included in the class. In doing so, the district judge quite properly exercised his duty to monitor the class representative and to protect the interests of absentees.

After trial, however, the district judge refused to modify his original definition of the class.[15] Instead of redefining the class to include black males, the district judge, in his Order of December 8, 1976, reiterated the class definition given in his pretrial order, without, however, providing any new explanation for this decision.[16] In view of the district court's

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[13] The district court found that "Travenol's failure to post notice of vacancies impedes the access of the company's *black employees* to the better paying and more desirable jobs," *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. 248, 260; and that "the procedures for promotion which defendants employ tend to perpetuate the past discrimination suffered *by blacks* at defendants' Cleveland plant." *Payne v. Travenol, supra* at 261; (emphasis added).

[14] The district court found that as a result of defendant's hiring policies, in February, 1969, "... 82% of the *male* operatives [at the Travenol plant] were white while 89% of the female operatives were white." *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. 248, 257. By 1970, "... 76.6% of the *male* operatives were white and 82.8% of the female operatives were white." *Payne v. Travenol, supra* at 258. With regard to defendant's policy of requiring a twelfth grade education for office and clerical jobs, the district court found that "this requirement disqualified 81.9% of *black males* over 25 and 88.9% of the black females over 25 ..." *Id.* The requirement that applicants for certain other positions possess a college degree was found to have a "substantial adverse impact on blacks" in that "only 3.2% of *black males* and 3.3% of black females" over 25 had college degrees. *Id.* at 259 (emphasis added).

[15] The district court concluded that only black females "should be in the class of individuals who are entitled to participate in the back pay award and other related relief to be afforded members of the class," in spite of his findings that defendants' hiring and promotion policies discriminated against all blacks, including black men.

[16] The district court explained that its post-trial ruling was based on "the reasons advanced at former hearings on the issue [of class certification]." The

(footnote continues)

finding that black males had indeed been the victims of unlawful racial discrimination, the December 8, 1976 decision was completely unjustified and should be reversed.

The district court's rationale for continuing to exclude black males from the plaintiff class even after trial was that there existed a *potential* conflict of interest between black females and black males. In this case, to paraphrase an old adage, the proof of plaintiff's ability to represent the interests of black males was in the representation thereof. Clearly, any potential conflicts at the relief stage of the litigation did not hinder plaintiffs' counsel from presenting sufficient evidence of discrimination against black men to support the district court's findings that black men as well as women were victims of defendant's discriminatory hiring policies. What more should be required to sustain a finding that the interests of black males had been adequately represented for the purposes of Rule 23?

Based on the district court's own findings following the trial on the merits, its post-trial order excluding black males from the plaintiff class compels reversal.

III. THE TRIAL COURT ERRED IN FAILING TO NOTIFY ABSENT CLASS MEMBERS THAT THEY WOULD BE EXCLUDED FROM THE ACTION

The district court believed that in this case black women could not adequately represent the interests of black men. Only one of the three original black plaintiffs was male; a Mr. James Williams. Thus, Mr. Williams was, in the eyes of the trial court, the sole representative of the absent black male class members.

In May, 1973, Mr. Williams chose to withdraw from the lawsuit, citing his "religious views." As far as the trial court was concerned, without Mr. Williams there was no one to represent the interests of absent black male members of the plaintiff class. Therefore, when Mr. Williams voluntarily chose to withdraw

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(footnote continued)

reason given at the pretrial hearing was that a potential conflict in the relief sought by black women and black men would render the former's representation of the latter inadequate.

his racial discrimination claim, the absent male class members were left without a representative and were, upon the defendant's motion, excluded from the lawsuit.

Once the district court had made it clear that it considered Mr. Williams to have been the sole adequate representative of the black male class members, plaintiffs' counsel requested that the absent class members be informed of the fact that their sole representative had decided to drop his claim. However, the trial court refused to allow the requested notice.[17] I believe that this was error and that the district court should have allowed notice for the absent male class members, informing them that their representative had decided to drop his (and their) action.

F.R.Civ.P. 23(e) provides that "... a class action shall not be dismissed or compromised without the approval of the Court, and notice of the proposed dismissal *shall* be given to all members of the class ..." (emphasis added). One "purpose of [Rule 23(e)] is to protect the nonparty members of the class ... when the representatives become fainthearted before the action is adjudicated." Wright and Miller, *Federal Practice and Procedure* § 1797. I believe that there is no question but that the mandatory notice requirement of Rule 23(e) was triggered in this case and that the trial court erred in failing to provide notice to the soon-to-be-excluded absentee class members.

Once a plaintiff class has been certified, the provisions of Rule 23(e) become applicable.[18] As the Majority correctly

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[17] Plaintiff's counsel: Would your Honor be agreeable to the sending of a notice to black males ... saying that they have been provisionally excluded from the class involved in this case and if they wish to come forward and represent and have their claims determined in this case also that one of them needs to step forward?

The Court: No. I don't think so. I am not going to go into that.

[18] It has been held that notice to absent class members is mandatory even when the class representative chooses to drop the action *prior* to class certification. *See, e.g., Retzenburg v. Neenah Joint School District, supra; Yaffe v. Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D.Ill. 1970); *Philadelphia Electric Company v. Anaconda Am. Brass Co.*, 42 F.R.D. 324, 326 (E.D.Pa. 1967). However, there is some counter authority. *See, e.g., Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978); *Roper v. Consurve*, 578 F.2d 1106 (5th

(footnote continues)

notes, *ante,* at 812, the notice requirement set forth in Rule 23(e) is mandatory. *Sagers v. Yellow Freight Systems, Inc.,* 68 F.R.D. 686 (N.D. Ga. 1975); *Duncan v. Goodyear Tire & Rubber Co.,* 66 F.R.D. 615 (E.D.Wis.1975); *Rotzenburg v. Neenah Joint School District,* 64 F.R.D. 181 (E.D. Wis. 1974); *Muntz v. Ohio Screw Products,* 61 F.R.D. 396 (N.D. Ohio 1973); *Washington v. Wyman,* 54 F.R.D. 266 (S.D.N.Y. 1971). However, the Majority has asserted that Mr. Williams' withdrawal as class representative and the resultant exclusion of black males from the plaintiff class did not constitute a "dismissal" within the meaning of Rule 23(e). *Ante,* at 812, n.14. Thus, the Majority concludes that Mr. Williams' departure and the exclusion of black males did into trigger the mandatory notice requirement.[19] I must take exception to this conclusion. When Mr. Williams withdrew from the action, his departure was arranged through the use of F.R.Civ.P. 21 (motion to drop a party). However, it is clear that " . . . the parties [should] not be allowed to circumvent [Rule 23(e)] simply by classifying a

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(footnote continued)

Cir. 1978); *Pearson v. Ecological Science Corp.,* 522 F.2d 171 (5th Cir. 1975). *Cf. Simer v. Rios,* 661 F.2d 655 (7th Cir. 1981) (Rule 23(e) is inapplicable prior to certification of the plaintiff class, however the Due Process Clause of the Fifth Amendment mandates notice to putative class members). It is therefore important to note that from November 17, 1972, until December 20, 1974, black males were indeed members of the certified plaintiff class. There may be some question as to whether Rule 23(e) applies when a representative chooses to withdraw *prior* to certification but " . . . of course, after certification Rule 23(e) clearly governs . . . " Developments in the Law—Class Actions, 89 Harv.L.Rev. 1318, 1542 n.32 (1976).

[19] In their footnote 14, the Majority seems to suggest that insofar as the plaintiff-appellants have failed to specifically cite Rule 23(e) in their argument regarding the trial court's refusal to provide notice, the issue need not be seriously considered by this Court. This reasoning defeats the very purpose of Rule 23. Rule 23(e) is designed to protect absent class members from being sold out or abandoned by their own class representatives. *See generally, 3B Moore's Federal Practice,* ¶ 23.80, *et seq.;* 7A Wright and Miller, *Federal Practice and Procedure* § 1797. It would turn the rule on its head to hold that Rule 23(e) will only be enforced if the class representative invokes it. In a case involving a "sell out" or abandonment of absent class members by the class representative, we could hardly expect the class representative to invoke Rule 23(e). That is why the mandatory notice requirements of Rule 23(e) can and must be raised by the court *sua sponte.*

dismissal as a motion to drop one or more parties under rule 21; the court is obliged to determine if the change in parties will affect the rights of the other class members so that notice of the motion should be given." Wright & Miller, 7A *Federal Practice and Procedure* § 1797.[20]

Rule 23(e) is designed to serve at least two important purposes. First, it protects absent class members who may be relying upon the pendency of a class action from being prejudiced if their named representative should choose to drop his (and their) action. Second, the Rule is a prophylactic device, a safeguard designed to discourage collusion.[21] Without Rule 23(e), class action defendants might seek to "buy off" class representatives in an effort to "turn off" a class action.[22]

Without in any way questioning the piety or sincerity of the named plaintiff who chose to withdraw from this case, we must recognize that his fortuitous departure from the lawsuit did result in the exclusion of all black males from the plaintiff class—a valuable boon to defendants. Thus, one can readily see the grave potential for abuse which will follow from the

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[20] For the purposes of Rule 23(e), dropping a party pursuant to Rule 21 is the functional equivalent of a voluntary dismissal if its effect will be to deny absent class members relief. *Philadelphia Electric Company v. Anaconda Am. Brass Co., supra. Compare, Zeffiro v. First Pennsylvania Banking & Trust Co.*, 82 F.R.D. 31 (E.D.Pa. 1979) (where only one of three named plaintiffs chooses to withdraw, and the two remaining plaintiffs are adequate representatives of absent class members' interests, Rule 23(e) notice is not required). Similarly, dropping a class action claim pursuant to Rule 15(a) will trigger the Rule 23(e) notice requirement, *McArthur v. Southern Airways, Inc.*, 556 F.2d 298 (5th Cir. 1977), *vac. on other grounds*, 569 F.2d 276 (5th Cir. 1978). Moreover, when the scope of a proposed plaintiff class is to be narrowed, and many of those once in the class are to be excluded, Rule 23 notice is required. *Ross v. Warner*, 80 F.R.D. 85 (S.D.N.Y. 1978); *Turoff v. Union Oil Co. of California*, 61 F.R.D. 51 (N.D.Ohio 1973).

[21] The rule is in part intended to prevent collusion, however it is not necessary to demonstrate collusion in order to trigger the notification requirement. 23(e) is a *per se* rule which requires notice to absent class members *whenever* the representative plaintiff chooses to voluntarily withdraw his action and the effect will be to prejudice the class members he represents.

[22] The mandatory notice requirement is intended to prevent representative plaintiffs from "selling out" their fellow class members. *Burks v. Lasker*, 441 U.S. 471, 99 S.Ct. 1831, 1841, n.16, 60 L.Ed.2d 404 (1979).

Majority's holding that Rule 23(e) notice is not required in a case such as this. Under the rule set forth by the Majority, future class action defendants may be tempted to quietly secure the withdrawal of the named class representative and thereby "turn off" the class action. If, as the Majority holds, Rule 23(e) can be ignored, there will be nothing to prevent such collusion.

Although the Majority holds that Rule 23(e) is inapplicable in this case, *ante* at 812 n.14, the Majority does indicate that if the absent class members were aware "of their initial inclusion in the plaintiff class, had relied on the class suit to protect their rights, and would be prejudiced as a practical matter by exclusion from the class," notice would indeed be mandatory. *Ante* at 813. However, the Majority concludes that because "there is no showing that black males relied to their detriment" on their provisional inclusion in the class, notice of their exclusion was not required. *Ante* at 813.

As the Majority suggests, there is some authority for the proposition that 23(e) notice need not be provided if the trial court determines that the absent class members have not detrimentally relied upon their inclusion in the class. *See, e.g., Roper v. Consurve,* 578 F.2d 1106 (5th Cir. 1978); *Wallican v. Waterloo,* 80 F.R.D. 492 (N.D.Iowa 1978); *Berse v. Berman,* 60 F.R.D. 414 (S.D.N.Y. 1973); *Elias v. National Car Rental,* 59 F.R.D. 276 (D.Minn. 1973). *But see, Rotzenburg v. Neenah Joint School District,* 64 F.R.D. 181 (E.D.Wis. 1974); *Muntz v. Ohio Screw Products,* 61 F.R.D. 396 (N.D.Ohio 1973). However, in those cases where district courts have seen fit to dispense with the 23(e) notice requirement, they have done so only after making a specific finding of fact concerning the question of whether absent class members may have detrimentally relied upon their inclusion in the plaintiff class. In each of these cases, the district court recognized its affirmative duty to safeguard the interests of absent class members. If the court determined that absent class members may have detrimentally relied upon inclusion in the plaintiff class, notice was ordered. *See e.g., Rotzenburg v. Neenah Joint School District, supra; Ross v. Warner,* 80 F.R.D. 88 (S.D.N.Y. 1978); *Muntz v. Ohio Screw Products,* 61 F.R.D. 396 (N.D.Ohio 1973). Only if the court specifically found that absent class members could not

have detrimentally relied was the Rule 23(e) notice dispensed with. *See, e.g., Elias v. National Car Rental Systems, Inc.*, 59 F.R.D. 276 (D.Minn.1973); *Wallican v. Waterloo*, 80 F.R.D. 492 (N.D.Iowa 1978).

In the instant case, however, the district court completely ignored its responsibilities under Rule 23(e). The trial court summarily rejected the request that the black male class members be notified, *see note* 17, *supra*, making no inquiry or determination as to whether the soon-to-be-excluded class members may have detrimentally relied upon their initial inclusion in the plaintiff class. I believe that this was error. If a plaintiff representative voluntarily takes action which will result in absent class members being denied relief, Rule 23(e) requires that the absent class members be notified. Although there is some authority for the proposition that such notice is unnecessary if it is determined that absent class members have not detrimentally relied upon their initial inclusion in the plaintiff class, notice can be dispensed with *only* if the trial court determines that as a factual matter absent class members did not detrimentally rely upon their initial inclusion. In this case, no such finding was ever made.

The Majority seems to suggest that because black male class members were never *formally* notified of their inclusion in the plaintiff class, they therefore could not have relied upon the pendency of the class action. However, in many reported cases, district courts have ordered 23(e) notice to absent class members even though the absentees never received formal written notice of their initial inclusion in the plaintiff class. *See, e.g., Rotzenburg v. Neenah Joint School District, supra. Washington v. Wyman, supra; Muntz v. Ohio Screw Products, supra; Ross v. Warner, supra.* Although the absent class members in this case may never have received formal written notice of their inclusion in the plaintiff class, we cannot just assume that they were unaware of the existence of this action. The record indicates

that Travenol Laboratories was the major employer in a small Mississippi town. Thus, many of the absent class members might well have learned of the pendency of this suit by word of mouth.

In this case, Rule 23(e) notice was required because "[c]lass members . . . may have relied upon informal publicity about the existence of the class suit and abstained from filing individual or class claims . . . . If a class member learned that a suit had been filed, but not that it had been terminated, he might lose his claim." Developments, *supra* at 1541. Thus, I believe that,

> "[M]any of the . . . abandoned . . . class members may have received actual notice of the suit . . . through publicity . . . and were perhaps deterred from instituting their own suits in reliance on their membership. Equity dictates that these possible litigants not forfeit their rights for lack of knowledge that they [were] once again on their own.

Ross v. Warner, supra at 91.

The Majority has also noted that because there had been "no showing" of detrimental reliance on the part of absentees, 23(e) notice was not required. *Ante* at 813. The Majority seems to suggest it was the plaintiff's burden to establish that absent class members had detrimentally relied upon their initial inclusion in the plaintiff class. Of course, this cannot be the rule. Rule 23(e) is designed to protect absent class members from collusion or abandonment *by their own representatives.* Certainly the representative parties cannot be relied upon to establish that 23(e) notice is required. Rather, it is the *trial court's* affirmative duty as monitor and guardian for the interests of absent class members to determine whether Rule 23(e) notice is necessary.

Whenever a representative plaintiff voluntarily chooses to take action which will result in the denial of relief to absent class members, Rule 23(e) notice is required:

> "By asserting a representative role on behalf of the alleged class, [the named plaintiff] voluntarily accepted a fiduciary obligation towards the members of

> the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement . . . if prejudice to the members of the class they claimed to represent would result . . ."

Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978).

> " . . . having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender."

Rothman v. Gould, 52 F.R.D. 494, 496 (S.D.N.Y.1971).

As Judge Clark, a member of this Majority, noted in an earlier case,

> "dismissal or compromise of the class suit may be detrimental to those persons who relied upon the class suit as the primary means of vindicating their legal claims . . . Dismissal of the class suit without notice may result in absentee class members' losing their claims entirely if they subsequently fail to file individual claims."

McArthur v. Southern Airways, Inc., 556 F.2d 298 (5th Cir. 1977) vac. on other grounds. 569 F.2d 276 (5th Cir. 1978)[23]

If, as the Majority contends, black women could not adequately represent the interests of black men, then Mr. Williams was the sole representative of the black male members of the plaintiff class. As we know, Mr. Williams chose to withdraw from this action. Once the district court determined that Williams' departure would result in the exclusion of all black males from the plaintiff class, the court was duty bound to inform the absent class members of the fact that their sole representative had dropped his (and their) claims. In refusing to allow such notice, the district court clearly failed in its role as

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[23] Although *McArthur v. Southern Airways, Inc., supra,* is no longer binding precedent in this Circuit, we may of course consider its sound reasoning and analysis.

guardian of the interests of the absent class members. This was not a matter of discretion. Rule 23(e) *required* that notice be sent.

IV. PARTING ADMONITIONS

It has not been my intent, in setting forth my reasons for this dissent, to attempt an exhaustive analysis of class action law. I wish merely to sound a note of alarm at the result reached by the Majority as to black males' exclusion from the class. There is enough in the district court's findings to indicate that black males have been discriminated against in violation of Title VII. Accordingly, black men are entitled to such relief as will give them their just and equitable place in the industrial orbit of Travenol's Cleveland, Mississippi plant. Certainly, they should not have been excommunicated from this lawsuit without notice and left to languish in industrial purgatory.

As a result of the Majority's commendable reasoning in regard to other aspects of class certification, this case must now be remanded to allow the inclusion of new members in the plaintiff class. See *ante*, Section IIC. Thus, there is no reason to suppose that adding black males to the plaintiff class will involve any further trespass on the court's time and resources. Even if we were to find that a new trial is required in order to allow black men to prove their claims of racial discrimination, this fact would not justify denial of relief. It is true that in some cases, justice delayed is justice denied. But on these facts, another apothegm is appropriate: justice takes precedence over the seconds on a clock. Considerations of time cannot be more important than the imperative to compensate victims of illegal conduct.

I like my brethren, am mindful of the fact that this case comes to us nearly a decade old. *See ante* at 2. There is the danger that *Payne v. Travenol Laboratories, Inc.* will become another "judicial paleolithic museum piece." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1168 (5th Cir. 1978)[24] Nevertheless, I believe my position in that earlier case is as

[24] At the time *Pettway* was so labeled, it was before this Court for the fourth time in thirteen years.

valid today as it was then: we should "remain mindful that the Court must not diverge from the direction chartered for us by the Title VII compass, no matter how long and difficult the journey."[25]

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[25] *Pettway v. American Cast Iron Pipe Co., supra.*

United States Court of Appeals,
FIFTH CIRCUIT

No. 80-3764

WILLIE MAE PAYNE, *et al.*,
Plaintiffs-Appellees
Cross Appellants,

v.

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,
Defendants-Appellants
Cross Appellees.

On Petitions for Rehearing and Suggestion for Rehearing En Banc
July 6, 1982

Before CLARK, *Chief Judge,* GOLDBERG and WILLIAMS, *Circuit Judges.*

PER CURIAM:

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestions for Rehearing En Banc are also DENIED.

ENTERED FOR THE COURT:

/s/ J. WILLIAMS
United States Circuit Judge

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC., *Petitioners*,

v.

WILLIE MAE PAYNE, *et al.*, individually and on behalf of all others similarly situated, *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 82-589

TRAVENOL LABORATORIES, INC., and

BAXTER LABORATORIES, INC.,

Petitioners,

v.

WILLIE MAE PAYNE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO DEFENDANTS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Petitioners, who were defendants below in this fair employment case, have asked this Court to grant a writ of certiorari and summarily vacate the decision below, on the ground that the court of appeals erred in overturning the district court's asserted finding of no

discriminatory purpose in the defendants' hiring practices, and in assertedly substituting its own finding of discriminatory purpose.

Consideration of the defendants' petition requires an examination of the actual findings made by the district court, of the actual actions taken by the court of appeals, and of the representations made by the defendants in both of the lower courts. These are set out at length below. The key omissions in the defendants' Statement of the Case may be summarized as follows:

(1) Contrary to the defendants' statement, the district court did make express findings of subjective racial discrimination against blacks in hiring and in promotions by the defendants' personnel officials and supervisors, and it made no conflicting

findings (see infra at 6-19);

(2) Contrary to the defendants' statement, the court of appeals merely affirmed the district court's findings of subjective discrimination as adequately supported by the evidence, and did not overturn any district court finding on intentional discrimination or attempt to substitute its own judgment on this question for that of the district court (see infra at 19-23);

(3) before both the district court and the court of appeals, the defendants judicially admitted what they here deny: the existence of district court findings of subjective racial discrimination against blacks in hiring and promotions. Far from challenging the existence of such findings, the

defendants asked the court of appeals to overturn the findings as not adequately supported by the evidence (see infra at 23-28);

(4) the point the defendants seek to raise before this Court was not raised at all before the district court, and was raised before the court of appeals only on the defendants' petition for rehearing (see infra at 28-32).

SUMMARY OF ARGUMENT

Plaintiffs submit that the question the defendants seek to raise in their petition does not arise in this case. The petition is based on a single sentence taken out of context from the district court's opinion, and incorrectly describes the actions of both lower courts. The decision of this Court last Term in Pullman-Standard v. Swint, 72 L.Ed.2d 66

(1982) would not allow the court of appeals to have reached any conclusion in this case different from the conclusion it did reach: that the district court's findings of subjective racial discrimination were not clearly erroneous, and that they must be affirmed.

Until the filing of their petition for rehearing, the defendants never challenged the principle that the district court had made findings of subjective racial discrimination. Instead, their challenge before the court of appeals was limited to the argument that the district court's admitted findings of subjective racial discrimination were not adequately supported by the record. These judicial admissions both serve as a strong corroboration of the clear meaning and purport of the district court's findings, and demonstrate that the defendants have

not adequately raised any contrary point below.

ARGUMENT

A. The District Court Found Intentional Discrimination by the Defendants' Personnel Officials and Supervisory Officials

1. The District Court's 1976 Findings on Liability

The district court made as clear as possible its findings that the defendants' personnel and supervisory officials had engaged in subjective discrimination. It began by stating the context of the defendants' actions:

> Prior to 1964, the defendants' work force was composed entirely of whites except for custodial or janitorial jobs. This exclusion of blacks from noncustodial jobs was based in part upon conformity to local racial traditions.

416 F.Supp. 248, 254, Pet.App. 8a. It continued, stressing the uncontrolled subjective discretion the defendants gave

their local officials in hiring decisions. Mr. Taylor, who was personnel manager at the plant from 1950 until 1966, was found to have received no written instructions from company management as to the standards he was to use in deciding which applicants to hire. The district court found: "His decisions were based mainly upon subjective factors and community references or recommendations played an important role in the hiring process." The recommendations largely came from an all-white committee of the Chamber of Commerce. 416 F.Supp. at 254, Pet.App. 7a-8a. When reliance upon community recommendations began to decline, the district court found: "[H]e concurrently began to rely more heavily upon his own subjective judgment in determining whether to accept an applicant for employment." Id.

The district court found that Mr. Taylor decided to impose two new hiring requirements---a tenth-grade education or G.E.D. equivalency certificate and referral by the Mississippi State Employment Service in 1965 ---contemporaneously with the end of the formal policy barring blacks from hire into Operative [Material Handler and Assembler] positions. Under the new policy, MSES referred only persons who met the tenth-grade requirement. Prior to that time, no blacks had been hired into Operative positions. 416 F.Supp. at 254, Pet.App. 8a-9a. The district court drew the inference that the imposition of the new educational requirement was related to racial considerations:

> In concluding that the education requirement is not job related, the court considers it highly pertinent that the standard was not adopted until the defendants began desegregating their work

> force in order to comply with the Civil Rights Act of 1964. United States v. Georgia Power Co., 474 F.2d 906,912 (5th Cir. 1973). Although the Cleveland plant had operated successfully for more than fifteen years without an educational policy of any sort in regard to the employment process, in 1965 Travenol determined to establish the tenth grade requirement for all noncustodial jobs, including the assembler and material handler positions which make up more than three quarters of Travenol's entire work force.

416 F.Supp. at 256-57, Pet.App. 13a (footnote omitted).

Mr. Taylor's successors as Personnel Manager enjoyed unfettered discretion as to applicants who satisfied the new educational requirement and were referred by MSES. After briefly discussing a personnel manager who served for a very short period, the district court described the hiring decisions of James Self, who served as personnel manager from July 15, 1968 through August 31, 1974. Finding that Mr. Self had been

given no instructions whatsoever, the district court continued: "During Mr. Self's tenure, hiring decisions as to persons referred by MSES were based primarily on subjective factors." 416 F.Supp. at 255, Pet.App. 9a.

The district court's many references to subjective decisionmaking were not mere surplusage. The court tied the subjectivity directly to racial discrimination in its discussion of "The Overall Effect of Defendants' Hiring Practices for Operative Positions":

> The record reflects that once an applicant for an operative job at Travenol has hurdled the tenth grade barrier, the hiring decision is based primarily on subjective factors. These job decisions are made by defendants' personnel managers without written instructions or directives from corporate headquarters. Among applicants for these positions who met the requirement of referral by MSES while it was in effect, the defendant hired proportionately fewer blacks. Defendants' records reflect that for the period from April, 1971 through August, 1974, one of every

> three white applicants for operative positions at Travenol was hired, but only one of every six black applicants was hired. This disparate result reflects the combined effect of a tenth grade requirement and of the defendants' subjective discrimination.

416 F.Supp. at 257, Pet.App. 14a.

Nor did the district court stop at that point in its discussion of subjective discrimination. It found that one of the most important factors in making promotional decisions was "the opinion of the employee held by his or her supervisor and certain officials of the personnel department." In discussing this factor, the district court found:

> And dependence upon the recommendation of defendants' predominantly white supervisory force is a "ready mechanism" to further impede black access to the supervisory ranks.

416 F.Supp. at 261, Pet.App. 21a.

From the above discussion, there can be no doubt that the district court

actually found subjective discrimination by the defendant's personnel officials and supervisory officials. The defendants seek to overcome these findings by a single statement of the district court, which they have taken out of context to suggest that the district court found no intentional discrimination in defendants' hiring process. The statement in question actually appears under the heading "Discrimination in Promotion", and follows the paragraph containing the above discussion of supervisory recommendations:

> The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well intentioned management attempting to deal with job applicants and employees, equally on a case by case, or individual basis; however, the employment policies which defendants adopted in apparent good faith have had the effect of substantially impeding the entry of blacks into the company's work force. The full

> extent of the cumulative effect of these policies is perhaps not yet appreciated by Travenol management, but the statistics brought forth in this case cannot fail to convince an objective observer that employment opportunities at Travenol's Cleveland plant were certainly, and to some extent remain, far from equal at the times pertinent to this case.
>
> While it is no doubt true that a great deal of the segregated nature of defendants' operation in Cleveland may be traced to the racial discrimination which has historically permeated American society in general, by passage and implementation of the Civil Rights Act of 1964, the Congress of the United States announced that the time has arrived to bring minorities into the work force of the nation's industries on an equal footing with persons of the majority race. ...

416 F.Supp. at 261, Pet.App. 21a-22a.

Plaintiffs submit that there is no conflict between this statement and the district court's earlier findings of classwide subjective discrimination. A company which decides to use an almost completely subjective personnel system is

liable for the uses its personnel officials and supervisors make of the authority thus given them, but the corporation's shareholders, directors, and senior management do not ordinarily intend that the personnel officials and supervisory officials use their powers so as to engage in racially disparate treatment. Seen from the perspective of the corporate managers and directors, there was no intent to discriminate; seen from the perspective of the personnel officials and lower-level supervisors making the decisions challenged in this case, there was disparate treatment. The same set of facts can be challenged under both theories. Compare Sledge v. J.P. Stevens & Co., 585 F.2d 625, 635 (4th Cir., 1978), cert. den., 440 U.S. 981 (1979) (disparate impact) with the decision below, 673 F.2d at 816-17 (disparate treatment). This Court itself has recognized that the

same set of facts may give rise to both forms of analysis: "Either theory may, of course, be applied to a particular set of facts." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

There is thus no inconsistency between the district court's findings that there was subjective discrimination at the lower levels for which the defendant is liable, and its finding that there was no intent to discriminate at the highest levels of the company. While plaintiffs submit that the district court's 1976 findings are abundantly clear on this subject, the district court's subsequent actions made it clear beyond cavil that subjective discrimination had been found.

2. The District Court's January 24, 1979 Order Referring Back Pay Claims to the Magistrate

The defendants have not reproduced

in their Appendix the district court's Order of January 24, 1979, referring the back pay claims in this case to the Magistrate. In that Order, the district court stated that the back pay claims of class members to be considered by the Magistrate include:

> (1) Claims of denial of employment in production jobs because of subjective discrimination in job interviews prior to February 19, 1976; ... .

This Order is set forth in the Appendix to this Opposition to the Defendants' Petition for a Writ of Certiorari, Opp. Cert.App. 1a, 3a. In a separate Order entered on the same day, the district court stated that its specification of back pay claims shall be taken as making any further findings necessitated by the specification. Opp.Cert.App. 5a.

3. The District Court's Decree

On August 18, 1980, the district

court entered a decree which stated in paragraph 3: "The defendants shall not permit their personnel or supervisory officials to engage in subjective discrimination on the basis of race ... in violation of Title VII ... or of 42 U.S.C. § 1981, in hiring and promotion decisions." Pet.App. 40a. This prohibition of further subjective discrimination in violation of 42 U.S.C. § 1981 was entered long after the Fifth Circuit had made clear that § 1981 prohibited only intentional discrimination. Williams v. DeKalb County, 582 F.2d 2 (5th Cir., 1978).

4. Conclusion as to the District Court's Findings

The district court's 1976 decision on liability, its 1979 order referring the back pay claims to the Magistrate, and its 1980 decree all make abundantly clear that the district court had found subjective discrimination by the

defendants' personnel officials and lower-level supervisory officials. Such discrimination clearly satisfies the standards of disparate-treatment analysis, and is clearly tantamount to a finding of discriminatory purpose. Cf. Castaneda v. Partida, 430 U.S. 482, 494-97 (1977) (statistical showing of significant underrepresentation of Hispanics on grand juries, coupled with proof of "highly subjective" decisionmaking, gives rise to an inference of intentional discrimination). The defendants' petition does not ask for a re-examination of either the settled rule that an employer is liable for the disparate treatment of blacks by its own personnel officials and supervisory officials, or of Castaneda's common-sense statements that subjective discrimination is intentional discrimination. The defendants' petition rests or falls on the accuracy of its description of the

district court's actions, and that description has been shown above to be inaccurate.

B. The Court of Appeals Merely Affirmed the District Court's Findings of Subjective Discrimination, and Did Not Substitute Its Judgment of the Ultimate Issue for That of the District Court

While the defendant urges that the court of appeals substituted its own judgment for that of the district court on the ultimate issue of intentional discrimination, a reading of the opinion below makes such an interpretation impossible to sustain. The court of appeals began by quoting the district court's finding that Travenol's hiring of a disproportionately small number of blacks was the effect of both the tenth-grade requirement and of the defendants' subjective discrimination. 673 F.2d at 816, Pet.App. 67a. The court then proceeded to inquire whether the district court's

ultimate finding of subjective discrimination was supported by adequate evidence in the record---the only inquiry the defendants asked the court of appeals to make. (See infra at 25-28). The court of appeals first canvassed the district court's subsidiary findings of fact, and found that---if they were supported in the record---they were an adequate basis from which the district court could properly draw the inference of subjective discrimination which it had in fact drawn. 673 F.2d at 818-20, Pet.App.71a-75a. The court of appeals next canvassed the record, to determine if the district court's subsidiary findings of fact were clearly erroneous. It found that they were well grounded in the record. 673 F.2d at 820-24, Pet.App. 75a-82a.

The discussion of the court of appeals is replete with marks of deference to the district court's fact finding.

E.g., "The statistics in the record, however, amply support the district court's findings and we may not set them aside as clearly erroneous", 673 F.2d at 820, Pet. App. 75a; "While Payne's statistics are not perfect, we find that they clearly suffice to support the district court's findings of a disparate result", 673 F.2d at 823, Pet.App. 80a; "Travenol offered two statistical alternatives in rebuttal, but the district court was not persuaded. We find that the district court's rejection of Travenol's evidence was not clearly erroneous", 673 F.2d at 823, Pet. App. 81a; on promotions, the errors in the defendants' exhibits "detract from the force of the defendant's proof, and the district court's decision to reject it is not clearly erroneous", 673 F.2d at 826, Pet.App. 87a; finally, the court of appeals remanded two issues for determination by the district court, so

that the district court would be able to find the facts in the first instance. 673 F.2d at 823, Pet.App. 80a. These are not the actions of a court riding rough-shod over the district court's superior ability to find facts, but those of a court paying great deference to that ability.

The defendants seek to make much of the court of appeals' statement that it was applying the "clearly erroneous" test to the district court's subsidiary findings of fact, petition at 9, but this does not establish that the court of appeals failed to give proper deference to the district court's ultimate finding of subjective discrimination. While the opinion below did not contain a parallel statement expressly applying the "clearly erroneous" test to the district court's ultimate conclusion, that fact is of no moment. This Court's certiorari power

does not exist to make editorial changes in appellate opinions, and an editorial change is all that is in question because the district court clearly made findings of subjective discrimination which were clearly upheld on appeal.

C. The Defendants Have Judicially Admitted that the District Court Found Subjective Discrimination in Hiring

1. Admissions in the District Court

On June 4, 1980, the defendants in this case sent to the Clerk for filing a document styled: "Defendants' Proposals Concerning Final Injunctive Relief". It was filed on June 9, 1980. In that document, the defendants admitted to the district court what they now contest before this Court: that the district court did in fact find subjective discrimination against blacks in hiring:

> Subjective discrimination in hiring operatives. The Court has

> ruled that defendants no longer discriminate in hiring. The Court's order referring this matter to the Magistrate provides that claims based on subjective discrimination in hiring do not exist beyond February 19, 1976. Order of January 24, 1979, at 2. This is consistent with the Court's statements that hiring discrimination was most evident "during the early years in dispute in this case, 1970 and 1971," 416 F.Supp. at 258, and that "Travenol's employment practices, particularly prior to 1973, were not consistent with the requirements of Title VII ... ." Id. at 261. ...
>
> Where, as here, voluntary employer action has eliminated a discriminatory practice, the Court cannot properly enjoin the practice. ...

Defendant's Proposal at 3. A copy of this document has been lodged with the Clerk.

Similarly, when the defendants objected to the Magistrate's Report and Recommendation Concerning Further Injunctive Relief, they did not challenge the principle that the district court had found subjective discrimination in hiring,

but argued instead that such discrimination had ended by February 19, 1976:

> Injunctive relief concerning hiring finds no basis in the Court's prior rulings. With respect to subjective discrimination in hiring, this Court has indicated to the precise contrary, that prospective injunctive relief is not proper. It expressly limited the scope of this issue to pre-February 19, 1976 claims in its January 24, 1979 Order of Reference on back pay. ...

Defendant's Objections to the Magistrate's Report and Recommendation Concerning Further Injunctive Relief, dated August 11, 1980 and filed August 13, 1980, at 6. A copy of this document has been lodged with the Clerk.

2. Admissions to the Court of Appeals

In its brief to the court of appeals, the defendants again recognized what was self-evident: that the district court had found subjective discrimination in hiring. Their appeal was based not on any lack of a dispositive finding, but on

the contention that the district court's finding was not based upon adequate evidence. The defendants' Statement of Issues in their January 5, 1981 opening brief stated as the first issue:

Statement of Issues

> 1. Could the District Court properly find that defendants' consideration of subjective factors in hiring for operative positions discriminated against black females where the record (a) contains no evidence that defendants intentionally rejected applicants on the basis of race or sex, (b) shows affirmatively that the factors relied upon did not exclude a disproportionate number of black females, (c) shows that the factors relied upon were related to job performance and (d) contains no suggestion that the factors were a pretense?

Defendants' opening brief at 1-2.[1/]

1/ The defendants' statement of the questions presented does not ask this Court to review the sufficiency of the evidence underlying the conclusion of both lower courts that company personnel officials and supervisory officials did in fact engage in disparate treatment discrimination against blacks. Accordingly, plaintiffs do not address the issue here.

Similarly, the defendants' Summary of Argument made clear that the defendants were asking the court of appeals to overturn the district court's finding of subjective discrimination in hiring:

> Summary of Argument
>
> 1. The injunction against subjective discrimination in hiring operatives is based on findings not supported by the record. Plaintiffs failed to make a prima facie showing of disparate treatment. ...

Id. at 13. A copy of the defendants' opening brief has also been lodged with the Clerk.

Where the defendants in a case have expressly represented to the court of appeals that there was in fact a finding of subjective discrimination below, and expressly restrict their challenge to the question whether the evidence of record is sufficient to support the district court's ultimate conclusion, it is unsurprising

that the resulting opinion contains no lengthy discussion of the admitted fact that there was an ultimate finding of subjective discrimination below. It is equally unsurprising that the resulting opinion affirming that ultimate finding would discuss the "clearly erroneous" rule only in connection with the district court's subsidiary findings of fact. The court had been led to believe that that was the only issue.

D. The Defendants Have Waived Their Contention by Failing to Urge to the Court of Appeals that the District Court Had Not Found Subjective Discrimination

The defendants' representations to the court of appeals are set forth above. Having led the court of appeals, through its April 22, 1982 decision on liability, to believe that there was no question as to the district court's entry of a finding

of subjective discrimination, the defendants challenged the existence of such a finding for the first time in their petition for rehearing before the court of appeals. Their petition was denied without elaboration, and they now seek to make the same point to this Court.

Plaintiffs submit that the defendants have waived any such point. If they had raised it at the district court level, the district court could have entered yet another explicit finding, on top of all of the others it had entered, and so dispelled any doubt the defendants might have had on the subject. Instead, the defendants reassured the district court that its findings were adequate. If the defendants had raised it on their appeal before the court of appeals handed down its decision, the court of appeals could have addressed the issue specifically in its opinion. Instead, the defendants

reassured the court of appeals that a finding of subjective discrimination had been made.

The defendants' failure to raise the point until after they had lost on the merits on appeal cannot be explained by the intervening decision in Pullman-Standard, because the point at issue is whether the district court in fact made findings of subjective discrimination. In both lower courts, the defendants maintained that such findings had been made until they lost; now, they say that no such finding was ever made. Pullman-Standard has no bearing on such a question of historical fact; if the district court's ultimate findings were admittedly adequate to resolve the issue while the defendants thought they had an acceptable chance of success meeting the findings head on, they should not be allowed now to complain to this Court that Pullman-Standard

somehow makes the same ultimate district court findings inadequate.

The inappropriate nature of the relief sought by the defendants is underscored by the fact that, if successful, they would probably obtain a new trial. The district judge who decided this case, Hon. Orma R. Smith, is now deceased and any new findings would have to be made by a different judge. While some evidentiary proceedings will be required by the court of appeals' remand order, this is a far cry from retrying the basic liability issues already tried seven years ago.

Plaintiffs submit that this Court should follow its usual rule of refusing to consider on a petition for certiorari any issue not raised on the basic appeal below. Delta Air Lines v. August, 450 U.S. 346, 362 (1981); United States v. Ortiz, 422 U.S. 891, 898 (1975) (court of

appeals misled by government's statements on appeal); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); California v. Taylor, 353 U.S. 553, 556 n.2 (1957). Under the circumstances of this case, the defendants' decision to wait until they had lost their appeal on the merits---before reversing their position and arguing in their petition for rehearing that the district court had failed to find subjective discrimination--- should not be considered a proper raising of the issues below.

CONCLUSION

Plaintiffs respectfully pray that

the Court deny the defendants' petition for a writ of certiorari.

Respectfully sumbitted,

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Dated: November 3, 1982

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE, et al.,

Plaintiffs,

v.

TRAVENOL LABORATORIES, INC., et al.,

Defendants.

No. DC 72-13-S Filed: January 25, 1979

ORDER

Due to the complexity of the issue of the necessity for and extent of any further injunctive relief in this cause, and the difficulty of the issue of entitlement of the named plaintiffs and members of the plaintiff class to back pay awards, such issues, pursuant to 28 U.S.C. §636(b)(2), Rule 53, F.R.Civ.P., and Local Rule M-2(d)(1) and (2), are hereby referred to United States Magistrate Charles M. Powers, as a Special Master with the fullest extent of powers available under Rule 53,

for preparation and submission of a report on said issue containing appropriate findings of fact and conclusions of law.

In accordance with the court's Memorandum of Decision entered herein on February 19, 1976, Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248 (N.D.Miss. 1976), and the decision of the Fifth Circuit Court of Appeals entered herein on January 6, 1978, Payne v. Travenol, 565 F.2d 895 (5th Cir. 1978) (as amended on denial of rehearing and rehearing en banc March 23, 1978), back pay claims of members of the plaintiff class, defined as:

> All present, past, and future black female employees and all present, past, and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitations

that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class

which shall be considered by the Special Master shall include:

(1) Claims of denial of employment in production jobs because of subjective discrimination in job interviews prior to February 19, 1976;

(2) Claims of denial of employment in office and clerical, technician, apprentice mechanic, and supervisory jobs because of the twelfth grade requirement;

(3) Claims of denial of promotion to supervisory jobs because of the twelfth grade requirement;

(4) Claims of denial of promotion to jobs above the level of operative because of the length of service criteria;

(5) Claims of denial of promotion to jobs above the level of operative because of the supervisor recommendation requirement;

(6) Claims of denial of transfer or promotion from assembler to material

handler because of the practice concerning "hooks" material handler positions;

(7) Claims of denial of employment in analyst jobs because of the college degree requirement;

(8) Claims based on mandatory fixed maternity leave; and

(9) Claims of discriminatory lay-off due to the "last-hired, first-fired" lay-off policy.

All issues concerning award of attorney fees to plaintiffs are reserved by the court.

ORDERED, this the 24th day of January, 1979.

/s/ Orma R. Smith
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE, et al.,

Plaintiffs,

v.

TRAVENOL LABORATORIES, INC., et al.,

Defendants.

No. DC 72-13-S Filed: January 25, 1979

ORDER

To whatever extent there remains confusion among the parties concerning the following issues in this cause, no findings of fact other than the express and implicit findings in the Memorandum of Decision entered on February 19, 1976, and those necessitated by the order appointing Special Master this date entered herein shall be made, and at this juncture no change in the definition of the plaintiff class previously certified herein is

contemplated by the court.

This the 24th day of January, 1979.

/s/Orma R. Smith
United States District Judge

Office - Supreme Court, U.S.
FILED
NOV 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,
Petitioners,

v.

WILLIE MAE PAYNE, *et al.*,
individually and on behalf of
all others similarly situated,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-589

TRAVENOL LABORATORIES, INC.
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Petitioners,

v.

WILLIE MAE PAYNE, *et al.*,
individually and on behalf of
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners ("Travenol") ask this Court to vacate the decision below because, contrary to *Pullman-Standard v. Swint*, 456 U.S. ____, 50 U.S.L.W. 4425 (U.S. April 27, 1982), the Court of Appeals rejected the District Court's finding that Travenol was "well intentioned" and substituted its own new finding, inferred from subsidiary facts, that Travenol intended to discriminate.

Respondents ("plaintiffs") oppose the petition on the ground that the District Court made a finding of subjective discrimination in hiring. This argument proceeds on the

premise that there need not be a finding of an intent to discriminate, and thus leaves unaddressed Travenol's argument that the Court of Appeals impermissibly inferred intent.

Travenol has never disputed that the District Court entered a finding of subjective discrimination. It was Travenol's challenge to this finding that required the Court of Appeals to examine first whether the statistics proved a disparity, and second, whether disputed hiring procedures were a pretext for an intent to discriminate.

The Court of Appeals rejected Travenol's contention that the statistics did not establish a disparity because they included the impact of an educational requirement. But the court agreed that the elimination of the education requirement issue had transformed the case from disparate impact into disparate treatment, and that proof of intent was "crucial." (App. 68a.) The court went on to infer intent from "subsidiary" findings of the District Court and thus to reject a contrary District Court finding that Travenol was "well intentioned."

Plaintiffs' argument that the District Court's finding of subjective discrimination is sufficient is nothing more than an argument that intent is unnecessary. This argument flies in the face of the Court of Appeals' determination that "the case must now be analyzed as a disparate treatment case," and that intent to discriminate is essential. (App. 68a.) Plaintiffs' position is not surprising; they argued below that Travenol was required to validate its hiring process under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a disparate *impact* case. Now they ask this Court to treat disparate treatment as disparate impact. (Plaintiffs' brief, pp. 13-15.) But disparate impact theory clearly is inapplicable and intent is a crucial element of disparate treatment. The Court of Appeals' inference of intent and rejection of the District Court's contrary finding were impermissible under *Swint*.

CONCLUSION

For the reasons set forth in Travenol's petition and above, the petition for a writ of certiorari should be granted, the judgment below vacated, and the matter remanded for reconsideration. Should the Court regard summary action as inappropriate, the writ should be granted.

Respectfully submitted,

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